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In The
Supreme Court of the United States

KEITH C. BROOKS,

Petitioner,

v.

STEVE GAENZLE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The 10th Circuit Court of Appeals ruled that a fleeing suspect who was intentionally shot in the back by police, but not thereafter promptly arrested, was not "seized" for Fourth Amendment purposes. The ruling creates a conflict between the 10th Circuit Court of Appeals and the 11th, 8th, and 6th Circuit Courts of Appeals on the following question presented:

> IS SHOOTING A FLEEING SUSPECT IN THE BACK A SEIZURE BY PHYSICAL FORCE EVEN THOUGH THE SUSPECT IS NOT IMMEDIATELY ARRESTED?

LIST OF PARTIES

1. Keith C. Brooks
2. Steve Gaenzle

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PETITION FOR A WRIT OF CERTIORARI

Keith C. Brooks respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the 10th Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the 10th Circuit in *Brooks v. Gaenzle,* 2010 WL 3122800 (10th Cir. 2010), is attached to this petition as Appendix Pages 1-40. The memorandum opinion of the United States District Court for the District of Colorado entering summary judgment on petitioner's case on the seizure issue, *Brooks v. Gaenzle,* 2009 WL 3158138 (D. Colo. 2009), is excerpted and attached as Appendix Pages 41-53.

JURISDICTION

On July 25, 2006, petitioner brought suit against respondent and other defendants in the United States District Court for the District of Colorado pursuant to 42 U.S.C. § 1983 alleging that respondent had violated the Fourth Amendment to the United States Constitution by shooting petitioner in the back as he fled, unarmed, from the scene of a burglary. The Honorable Michael J. Watanabe, Magistrate Judge for the United States District Court for the District of Colorado, appointed the undersigned counsel to represent petitioner *pro bono.*

On June 25, 2007, Judge Watanabe filed his findings and recommendations wherein he recommended that summary judgment in favor of defendants be entered. On September 29, 2009, the Honorable Christine M. Arguello, United States District Court Judge for the District of Colorado, affirmed and adopted the findings and recommendations and dismissed petitioner's complaint.

On August 10, 2010, The United States Court of Appeals for the 10th Circuit issued an opinion affirming the District Court's order. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AT ISSUE

Fourth Amendment To The United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Facts Of The Case

On October 17, 2005, petitioner Keith C. Brooks, a black male, and his accomplice, Nicholas Acevedo, a white male, forcibly entered a residence located on Lindstrom Drive, El Paso County, Colorado, intending to burglarize the home. A neighbor, Tim McElroy, witnessed Brooks' and Acevedo's forced entry and called 911.

El Paso County Sherriff's Deputies Steve Gaenzle and Paul Smith were dispatched to the Lindstrom Drive residence. Outside the garage, Gaenzle thought he could hear voices from two, possibly three, people inside. Gaenzle and Smith entered the garage through the side yard door announcing "Sheriff's Office" or some similar announcement. Once inside the garage, Gaenzle and Smith observed a white male kneeling in the garage. The white male stood up, turned, and ran into the house through a door connecting the garage with the kitchen.

The white male suspect closed the door behind him and attempted to barricade the door by pushing his weight against it. Gaenzle announced "Sheriff's Office" one more time before kicking at the door with his foot. Gaenzle kicked at the door two more times and each time he could see the white male suspect's clothing pushing against the inside of the door.

After Gaenzle kicked the door for the third time, a shot was fired through the door from inside the

kitchen. The bullet passed between Gaenzle and Smith. Gaenzle and Smith then retreated back into the side yard, confirmed that neither was injured, and then observed a black male, Brooks, fleeing across the back yard toward the rear fence.

At the time Gaenzle and Smith entered the garage, Brooks was in a back bedroom. Brooks heard voices and commotion. He left the bedroom and arrived in the dining room area adjacent to the kitchen just as Acevedo pulled a gun from his waistband and fired through the door. Believing Acevedo had just fired on returning homeowners, Brooks unlocked a sliding glass door in the dining room and started running through the back yard toward the back fence. Brooks was not carrying a gun.

Gaenzle claims he saw a gun in Brooks' hand as Brooks ran toward the fence. Tim McElroy, who continued to observe events unfolding across the street, saw Brooks running across the yard but saw no gun in his hand. Gaenzle yelled "Stop," though Brooks heard no such command, before he shot Brooks in the back as Brooks was climbing the 6-foot-high back yard fence. The bullet lodged inside Brooks' torso millimeters from his spine, where it remains to this day. Smith, however, never raised, aimed, or fired his weapon at Brooks.

Despite being shot, Brooks climbed over the fence. Next, Gaenzle saw him "hobbling" and "limping" as he continued to flee the scene through the

neighboring back yard. Though Gaenzle had hobbled his target, he and Smith did not pursue Brooks.

Brooks was arrested three days after the burglary. Law enforcement cornered Acevedo 16 days after the burglary. When they did, Acevedo was shot dead on the street as he drew a gun and attempted to shoot the arresting officer. When he died, Acevedo was clutching the gun used to fire on the deputies during the Lindstrom Drive burglary.

Brooks was charged and tried for: (1) criminal attempt to commit murder in the first degree, after deliberation, of a police officer; (2) criminal attempt to commit murder in the second degree; (3) assault in the first degree; (4) first degree burglary – assault or menace; (5) first degree burglary – deadly weapon; (6) menacing; and (7) possession of a weapon by a felon. Brooks also was charged with a sentencing enhancement under CRS § 18-1.3-406 for allegedly using and possessing a deadly weapon during the commission of the charged offenses.

A jury convicted Brooks of all charges except the weapons charges. The verdict effectively exonerated him of firing on the deputies. Brooks' conviction on the attempted murder charge was based solely on his complicity with Acevedo. Brooks was sentenced to 148 years as an habitual criminal under CRS § 18-1.3-801. Brooks' criminal record contains no evidence that Brooks ever carried or was known for carrying a firearm.

Following his acquittal on the weapons charge, Brooks filed suit as a *pro se* plaintiff against Gaenzle alleging that Gaenzle used excessive force when he shot the unarmed Brooks in the back. Brooks alleged that the use of deadly force under the circumstances violated his Fourth Amendment right to be free from the unreasonable seizure of his person.

B. What Did The District Court Decide?

Based on the fact that Brooks "managed to climb the fence and elude arrest for three days," the district court decided that "Gaenzle's gunshot amounted to nothing more than a non-actionable attempted seizure." *Brooks*, 2009 WL 3158138 at *5; Appendix at 50. The district court recognized the restraint inherent in being shot in the torso when it found that Gaenzle's gunshot caused "pain or slowed the pace of [Brooks'] escape." *Brooks*, 2009 WL 3158138 at *6; Appendix at 52. But, for the district court, the acknowledged impairment of Brooks' movement was insufficient to constitute a seizure because it did not "bring [Brooks] within the government's possession or control." *Brooks*, 2009 WL 3158138 at *6; Appendix at 52.

C. What Did The 10th Circuit Court Of Appeals Decide?

Even though Gaenzle shot Brooks in the back with the intent to stop him, the appellate court analyzed the shooting as a mere "show of authority"

because Brooks escaped arrest after being shot. *Brooks v. Gaenzle,* 2010 WL 3122800 at *7, *8 (10th Cir.); Appendix at 17, 18, 19, 21. Without the "termination of movement or submission" required to meet the "show of authority" standard for a seizure, the appellate court found the act of shooting Brooks was nothing more than an "attempted seizure." *Brooks,* 2010 WL 3122800 at *7, *8, *9; Appendix at 17, 21-22, 24.

WHY ISSUE A WRIT OF CERTIORARI?

Because The 10th Circuit Court Of Appeals' Decision That Shooting An Unarmed Fleeing Suspect In The Back Is Not A Seizure If The Effort To Arrest Was Not Successful Conflicts With Decisions Of The 11th, 8th, And 6th Circuit Courts Of Appeals, As Well As This Court's Decisions In *Terry, Garner,* And *Hodari,* A Writ Of Certiorari Should Issue In Order To Restore Uniformity Among The Circuits On A Vital And Important Fourth Amendment Question

A. How Has This Court Defined A "Seizure" In Its Precedent?

This Court has recognized two modes of effecting the seizure of a person: (1) by the application of physical force with the intent to restrain; or (2) by a person's submission to a show of authority. When physical force is used, this Court has held the effort to arrest need not succeed in order to effect a seizure. *California v. Hodari,* 499 U.S. 621, 626, 111 S.Ct.

1547, 1551 (1991). The 10th Circuit's *Brooks* opinion fails to follow this standard because it classifies an unsuccessful effort to arrest by use of deadly, physical force as merely a "show of authority."

Terry v. Ohio, 392 U.S. 1, 16, 19, 88 S.Ct. 1868, 1877, 1879 (1968), examined the constitutionality of "stop and frisk" investigative tactics. In that context, *Terry* defined a seizure as an event where an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry*, 392 U.S. at 19, n. 16, 88 S.Ct. at 1879. But *Terry* expressly held that the "restraint" required for a seizure need not result in custodial arrest:

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate a trip to the station house and prosecution for crime – "arrests" in traditional terminology . . . . We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" . . . .

Terry, 392 U.S. at 16, 19, 88 S.Ct. at 1877, 1879 (1968).

In *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985), a case with facts similar to this case, this Court ruled that "there can be no question" that shooting an unarmed fleeing suspect constitutes a Fourth Amendment seizure. *Garner*, 471 U.S. at 7, 105 S.Ct. at 1699. The *Garner* court observed that

"[t]he intrusiveness of a seizure by means of deadly force is unmatched." *Garner*, 471 U.S. at 9, 105 S.Ct. at 1700. The Court reasoned that "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." *Garner*, 471 U.S. at 7, 105 S.Ct. at 1699. Although the shot fired by police killed Garner, *Garner* does not hold that the application of deadly force must be fatal before it is a seizure.

After *Garner*, this Court revisited the fatal seizure of a fleeing suspect in *Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378 (1989). *Brower* is the primary case on which the 10th Circuit based its *Brooks* decision. In *Brower*, police killed a suspect in a high-speed car chase by concealing a roadblock behind a bend in the road and blinding the suspect to the roadblock ahead by aiming headlights at his windshield. The trial and appellate courts ruled that the suspect had not been seized because he had not submitted to any of law enforcement's "shows of authority" at any time in the preceding 20-mile high speed chase, though "[h]e had a number of opportunities to stop his automobile prior to the impact." *Brower*, 489 U.S. at 595, 109 S.Ct. at 1381.

This Court reversed, holding that the suspect's decision to flee, and his success at fleeing, was irrelevant to the reasonableness of the means used to terminate his flight. *Brower*, 489 U.S. at 595, 109 S.Ct. at 1381. In dicta the *Brower* court stated that since "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control," for

purposes of decedent's estate's case it had been "enough for a seizure that [the decedent] was stopped by the very instrumentality set in motion or put in place to achieve that result." *Brower*, 489 U.S. at 599, 109 S.Ct. at 1382.

This dicta in *Brower* troubled Justices Stevens, Brennan, Marshall, and Blackmun, who concurred in the result but did not join in the opinion because:

> [I]ts dicta seem designed to decide a number of cases not before the Court and to establish the proposition that '[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control.' *Ante* at 1380. The intentional acquisition of physical control of something is no doubt a characteristic of the typical seizure, but I am not entirely sure that it is an essential element of every seizure or that this formulation is particularly helpful . . . .

Brower, 489 U.S. at 600, 109 S.Ct. at 1383.

In *Hodari*, this Court resolved the problem posed by *Brower's* dicta by ruling that "physical control" is not an "essential element of every seizure."[1] *Brower*, 489 U.S. at 600, 109 S.Ct. at 1383; *Hodari*, 499 U.S.

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[1] As observed in *Hodari*, common law seizure of an *inanimate* object required physical control over the object. While physical control over an *animate* object is one indicia of a seizure, "physical control" is not a necessary element for the seizure of an *animate* object. *Hodari*, 499 U.S. at 624, 111 S.Ct. at 1550.

at 626, 111 S.Ct. at 1550. In *Hodari* a defendant moved to suppress cocaine he discarded as he fled from police. The police overtook and arrested the defendant and retrieved the cocaine he discarded during his flight. The defendant argued that he had been seized the moment he fled with the police in pursuit. The *Hodari* Court disagreed. According to the Court, Hodari had not been seized before he discarded the cocaine because Hodari fled Officer Pertoso's show of authority and had been "untouched by Officer Pertoso at the time he discarded the cocaine." *Hodari*, 499 U.S. at 625, 111 S.Ct. at 1550.

The *Hodari* Court looked to common law to define the scope of "seizure" or "arrest" as contemplated by the Fourth Amendment, and stated as follows:

> To constitute an arrest, however – the quintessential "seizure of the person" under our Fourth Amendment jurisprudence – the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient. *See, e.g., Whitehead v. Keyes*, 85 Mass. 495, 501 (1862) ("[A]n officer effects an arrest of a person whom he has authority to arrest, by laying his hands on him for the purpose of arresting him, though he may not succeed in stopping and holding him."); 1 Restatement of Torts § 41, Comment *h* (1934). As one commentator described it:
>
> > There can be constructive detention, which will constitute an arrest, although the party is never actually brought

> within the physical control of the party making the arrest. This is accomplished by merely touching, however slightly, the body of the accused, by the party making the arrest and for that purpose, although be does not succeed in stopping or holding him even for an instant; as where the bailiff had tried to arrest one who fought him off by a fork, the court said, "If the bailiff touched him, that had been an arrest . . . ." A. Cornelius, Search and Seizure 163-164 (2d Ed. 1930).

Hodari, 499 U.S. at 625, 111 S.Ct. at 1550.

From these common law principles, the *Hodari* Court concluded that "an arrest is effected by the slightest application of physical force, despite the arrestee's escape." *Hodari*, 499 U.S. at 625, 111 S.Ct. at 1550. Further, the Court stated that:

> The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful.

Hodari, 499 U.S. at 625, 111 S.Ct. at 1550. Thus, *Hodari* ruled that "[a]n arrest requires *either* physical force . . . *or*, where that is absent, submission to the assertion of authority." *Hodari*, 499 U.S. at 626; 111 S.Ct. at 1551 (emphasis added). Or, stated another way, a seizure is an "application of physical force *to* restrain movement, even when it is ultimately unsuccessful." *Hodari*, 499 U.S. at 626 (emphasis added). For purposes of physical force seizures (as opposed to

"show of authority" seizures), what matters is that physical force is applied to the suspect's person with the *intent* to restrain movement, not the success of the effort to restrain.

B. How Have The Circuit Courts Of Appeals Interpreted And Implemented This Court's Seizure Precedent In Shooting Cases?

Except for the 10th Circuit's decision in *Brooks*, the circuit courts of appeals have consistently held, in keeping with *Hodari's* precedent and progeny, that police effect a seizure the moment a bullet or similar projectile impacts their intended target. Though in some cases the suspects were killed, arrested, or brought down soon after being shot by police, the courts of appeals' decisions reflect that success in "terminating" a target's movement plays no role in, is "immaterial" to, the seizure determination in gunshot cases.

The 11th Circuit Court of Appeals' decision in *Carr v. Tatangelo*, 338 F.3d 1259 (11th Cir. 2003), found that shooting a suspect is a seizure even though the suspect was never arrested. In *Carr*, an officer staking out Carr and another suspect shot Carr in the chest believing that he had heard Carr or the other suspect actuating the slide of a semi-automatic weapon. Without even realizing he had been shot, Carr fled into his house before collapsing in the hallway. The officers did not pursue Carr but instead retreated to their cruisers to call for backup.

Carr was taken to a hospital and was never arrested or charged with any offense.

When Carr sued under 42 U.S.C. § 1983, the officer defended claiming that "a seizure did not occur under the Fourth Amendment because [Carr] was not stopped but ran back into his house." *Carr*, 338 F.3d at 1268. The *Carr* court disagreed with the officer's defense, holding that:

> Officer Fortson had shot to kill to save the life of Officer Tatangelo, and it is his intent *and the physical contact of the bullet from his gun* that governs our Fourth Amendment seizure analysis. Although Carr was not immediately stopped by the bullet from Officer Fortson's gun, he nevertheless was seized within the meaning of the Fourth Amendment *when the bullet struck or contacted him*.

Carr, 338 F.3d at 1268 (emphasis added).

After *Carr*, the 11th Circuit again determined that police effected a seizure the moment a "bullet struck or contacted" a suspect without consideration of whether the suspect was subsequently arrested. *Carr*, 338 F.3d at 1268. In *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), police attempted to terminate a high-speed pursuit and rolling roadblock of a suspect vehicle by firing three shots at the vehicle's driver. None of the shots hit the driver, but one hit the vehicle's passenger, Vaughan, paralyzing him from the chest down. Vaughan sued under 42 U.S.C. § 1983. The officer claimed that he had not seized

Vaughan because he intended to hit the driver, not Vaughan.

The *Vaughan* court determined that, though not the intended target, police seized Vaughan because "Vaughan was hit by a bullet that was meant to stop him." Further:

> The fact that Vaughan was not taken into custody immediately following the shooting is immaterial. As the Supreme Court has noted, the "application of physical force to restrain movement, even when it is ultimately unsuccessful" is sufficient to constitute a seizure.

Vaughan, 343 F.3d at 1329, n. 5, *quoting Hodari,* 499 U.S. at 626, 111 S.Ct. at 1550, *see also Mercado v. City of Orlando,* 407 F.3d 1152, 1157 (11th Cir. 2005) (suspect seized when police shot him in the head with a rubber projectile).

Cole v. Bone, 993 F.2d 1328 (8th Cir. 1993), like *Brower*, is a high speed chase case that ended in a fatality. After pursuing an 18-wheel truck for over fifty miles, police shot and killed the truck's driver. As in *Brower,* the court ruled that law enforcement's various and unsuccessful "shows of authority" during the chase – rolling roadblocks, stationary roadblocks, and shooting at the truck's tires and radiator – were not seizures because they did not cause the truck's driver to stop. The driver "was not seized until he was struck by the shot from [the trooper's] revolver." *Cole,* 993 F.2d at 1332. Like *Carr* and *Vaughan,* the *Cole*

court determined the seizure had occurred the moment the target "was struck."

The 8th Circuit again addressed a physical force seizure in *Ludwig v. Anderson,* 54 F.3d 465 (8th Cir. 1995). Police shot and killed a mentally unstable homeless Viet Nam veteran after he fended them off with a knife and fled. Before shooting him, police attempted to knock him over by hitting him with a police car at 15 miles per hour. Ludwig continued to flee before he was shot dead.

Noting that "many different seizures may occur during a single series of events," the *Ludwig* court held that "Ludwig was twice seized in a potentially unreasonable manner: first when [the officer] attempted to hit Ludwig with the squad car," despite the fact that the effort to thereby arrest him failed, "and second when Ludwig was ultimately shot." *Ludwig,* 54 F.3d at 471. *See also Moore v. Indehar,* 514 F.3d 756 (8th Cir. 2008) (shot suspect seized despite his subsequent escape).

In *Ciminillo v. Streicher,* 434 F.3d 461 (6th Cir. 2006), police shot a person in the face and chest with "bean bag" rounds while he was attempting to peaceably leave the scene of a street riot with his hands held in the air. After shooting Ciminillo, police ordered him to the ground, but then told him to report to police at the perimeter containing the riot. Ciminillo did so but was told by the perimeter police to leave. The *Ciminillo* court ruled that he had been seized when police shot him and the fact "[t]hat

Ciminillo was not eventually placed in handcuffs or taken to the police station does not preclude a determination that he was seized." *Ciminillo,* 434 F.3d 461. Also, in *Sargent v. City of Toledo,* 150 Fed.Appx. 470, 474-75 (6th Cir. 2005), the 6th Circuit held that a suspect "was seized when [the officer] shot him in the bedroom." And in *Fisher v. Memphis,* 234 F.3d 312 (6th Cir. 2001), the court held that the passenger of a moving vehicle had been seized when hit by a bullet police fired in an attempt to stop the vehicle. The *Fisher* court found that the combination of "shooting at the car" and "intend[ing] to stop the car" effected a seizure, without any consideration given to whether the car was thereby or thereafter stopped. *Fisher,* 234 F.3d at 318-19.

Though not shooting cases, cases from the 3rd and 7th Circuits are consistent with the 11th, 8th, and 6th Circuits' interpretations of *Hodari* that a seizure occurs upon the application of physical force. In *United States v. Brown,* 448 F.3d 239 (3rd Cir. 2006), officers detained two black men without reasonable suspicion based on an overly-general description of purse snatching suspects heard over their radios. In the ensuing *Terry*-type stop, police discovered a gun on Brown, who then attempted to flee. When trying to determine "when the seizure of Brown occurred" for suppression purposes, the *Brown* court interpreted *Hodari* to mean that "when a seizure is effected by even 'the slightest application of physical force,' it is immaterial whether the suspect yields to that force." *Brown,* 448 F.3d 239, 245 (3rd Cir. 2006).

Also, in *United States v. Dupree,* 2010 WL 3063290 (3rd Cir.), where the court suppressed a gun dropped by a passing bicyclist whom the police had grabbed without reasonable suspicion to believe he was the suspect they were looking for, the court determined that the "act of grabbing Dupree, no matter how short in duration, effected a seizure within the meaning of the Fourth Amendment" even though "Dupree almost immediately broke free [and] gave chase." *Dupree,* 2010 WL 3063290 at *12.

The 7th Circuit Court of Appeals issued a line of cases in which it excepts minor, non-restraining physical contact from effecting a seizure. *Acevedo v. Canterbury,* 457 F.3d 721, 725 (7th Cir. 2006), observed that "[c]ertain types of non-restraining physical contact, without a concomitant showing of authority, are just too minor to constitute a 'seizure' for Fourth Amendment purposes." The 7th Circuit's exception for minor, non-restraining physical contact inherently recognizes that all other forms of physical contact applied with the intent to restrain (such as shooting a suspect in the back) do effect a seizure. *See also Leaf v. Shelnutt,* 400 F.3d 1070, 1091 (7th Cir. 2005) (nudging sleeping suspect to wake him not a seizure); *Martinez v. Nygaard,* 831 F.2d 822, 826-27 (9th Cir. 1987) (grabbing individual's shoulder from behind to get his attention not a seizure); *Carlson v. Bukovic,* 2010 WL 3432218 (7th Cir.) (taking person by arm to encourage them to leave a store not a seizure).

The prevailing principle that emerges from the 11th, 8th, and 6th Circuit's shooting cases, which is

shared implicitly by the 3rd and 7th Circuits' physical force cases, is that a seizure occurs the moment a suspect is "hit by a bullet meant to stop him," without consideration of whether the suspect is arrested or is thereby physically or temporally restrained. Unlike the 10th Circuit, other Circuit Courts of Appeals, consistent with *Hodari,* either deem the "unmatched"[2] bodily intrusion of being shot an inherent restraint on freedom of movement worthy of Fourth Amendment protection, or deem actual restraint simply "immaterial" to the seizure analysis.

C. How Did The 10th Circuit Court Of Appeals Decide The *Brooks* Case?

The 10th Circuit botched the seizure question by predicating its analysis on whether the effort to arrest was successful. The 10th Circuit erroneously reasoned that any unsuccessful effort to arrest was a mere "show of authority," an ineffectual "police pursuit," even if deadly, physical force was applied to the suspect's person. *Brooks,* 2010 WL 3122800 at *7, Appendix at 17-18. Consequently, the *Brooks* court applied the stricter "termination of movement or submission" standard governing "show of authority" seizures. *Brooks,* 2010 WL 3122800 at *7, *8; Appendix at 17, 21; *Hodari,* 499 U.S. 626, 111 S.Ct. at 1550. Since Brooks "continued to flee without the deputies' acquisition of physical control," the 10th Circuit

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[2] *Garner,* 471 U.S. at 9, 105 S.Ct. at 1700.

believed he could not satisfy the "show of authority" submission standard. *Brooks*, 2010 WL 3122800 at *8, *9; Appendix at 21, 22. Thus, the 10th Circuit found that shooting Brooks had been merely an "attempted seizure." *Brooks*, 2010 WL 3122800 at *7, *8, *9; Appendix at 17, 18, 21, 22; *BROOKS* SEIZURE ANALYSIS FLOW CHART, Appendix at 54. Citing *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708 (1998), for the general proposition that "'attempted seizures' are beyond the Fourth Amendment's scope," the 10th Circuit concluded that Brooks had not been seized.

Contrary to the approach taken in the *Brooks* decision, *Hodari* predicates the seizure analysis on the presence or absence of physical force. Where even "the slightest application of" physical force is present, *Hodari* requires only that this force be applied with the *intent* to restrain to effect a seizure. But "where [physical force] is absent," *Hodari* requires that this "show of authority" produce the suspect's "submission" to effect a seizure. *Hodari*, 499 U.S. at 626, 111 S.Ct. at 1551. The 10th Circuit sidestepped this distinction by dismissing *Hodari's* binary seizure standard as "common law dicta." *Brooks*, 2010 WL 3122800 at *7; Appendix at 16, 17.[3] *HODARI* SEIZURE ANALYSIS FLOW CHART, Appendix at 54.

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[3] Ordinarily, the 10th Circuit "considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright

(Continued on following page)

Instead of following *Hodari*, the *Brooks* court sought support for its application of the "show of authority" seizure standard to Brooks' shooting from three of its own "show of authority" cases: (1) *Reeves v. Churchich*, 484 F.3d 1244 (10th Cir. 2007), in which officers were deemed merely to have shown their authority to civilians at the scene of an arrest when they pointed, *but did not fire*, their weapons at the civilians; (2) *Latta v. Keryte*, 118 F.3d 693 (10th Cir. 1997), in which a police vehicular pursuit that escalated to shooting out the suspect's car's tires, *but not the suspect himself*, was ruled a show of authority; and (3) *Bella v. Chamberlain*, 24 F.3d 1251 (10th Cir. 1994), in which "show of authority" shots fired at a fleeing helicopter were deemed not to have seized a hostage within because none of the shots *struck the hostage*. Since none of the cited cases involved applications of physical force to a suspect's person, they do not support the 10th Circuit's proposition that an unsuccessful effort to arrest by application of physical force is merely a "show of authority."

Next, the 10th Circuit claimed to find support in three other circuits for "requiring intentional termination of movement or acquisition of physical control"[4] over Brooks as a precondition for a physical

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holdings." *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996). Even assuming the *Hodari* standard is dicta, the *Brooks* decision does not explain why it was so quick to ignore it in this case.

[4] *Brooks*, 2010 WL 3122800 at *9; Appendix at 23.

force seizure: *Cameron v. City of Pontiac,* 813 F.2d 782 (6th Cir. 1987); *United States v. Hernandez,* 27 F.3d 1403 (9th Cir. 1994); *United States v. Bradley,* 196 F.3d 762 (7th Cir. 1999). A closer examination of these three cases reveals that they are neither apposite nor supportive:

> *Cameron*: A burglary suspect fled a home pursued on foot by police who shot at but did not hit, or otherwise make physical contact with him. The suspect climbed a fence and was hit by a car when he landed on the other side. The court ruled that a seizure did not occur because the suspect was killed by a car, not by any force applied by police. *Cameron* is inapposite because, like *Lewis,* it simply ruled that a seizure can only occur through means intentionally applied.
>
> *Hernandez*: Police asked a suspicious pedestrian to stop. The officer grabbed hold of the suspect but, in the ensuing physical scuffle between them, he escaped the officer's grasp. As he fled, he discarded a gun but was later apprehended. The court denied the suppression motion because the suspect had not been seized at the time he discarded the gun. *Hernandez* is inapposite because Hernandez did not rely on the physical altercation as the basis for his seizure argument. Instead Hernandez argued that a seizure occurred "despite his subsequent flight because he hesitated for a moment and made direct eye contact with [the officer]." *Hernandez,* 27 F.3d at 1407. Thus a seizure by application of

physical force was not before the *Hernandez* court.

Bradley: A police officer shot at a vehicle attempting to stop it. The bullet traveled through the trunk and rear seat, and lodged in the steel plate support of the driver's seat, delivering a hard blow to the driver's back. The driver then pulled over but was released at the scene. The court held that the driver had been seized because he had pulled over. *Bradley* is inapposite because the specific question relevant to this case – whether the blow to the driver's back from the bullet's impact on the steel seat support was alone sufficient for a seizure – was never raised or ruled on.

In short, the 10th Circuit cited no legally or factually apposite authority for its assertion that termination of movement or acquisition of physical control are conditions precedent to a physical force seizure. Nor do *Cameron, Hernandez,* or *Bradley*, hold that shooting a suspect should be analyzed as a "show of authority."

Finally, though the district court found that Gaenzle's shot had restrained Brooks in the form of "slowed movement," the 10th Circuit refused to rule on Brooks' claim that this restraint was sufficient to constitute a seizure (assuming, contrary to *Hodari,* that actual restraint is a necessary element of a physical force seizure). *Brooks,* 2009 WL 3158138 at *6, Appendix at 52. The district court's "slowed

movement" finding was factually supported by Gaenzle's deposition testimony [KCB0257]:

> Q: All right. Did the suspect [Brooks] appear wounded to you?
>
> A: There – at the – as soon as I got sight of the suspect, the person was holding his left side and hobbling.
>
> * * *
>
> Q: Hip? Okay, so his left hand was on his left hip, and he was limping?
>
> A: Yes.

Shooting Brooks with the intent to restrain him is alone enough to satisfy *Hodari's* seizure standard as applied by other circuit courts. But, even if some form of actual restraint were required before shooting Brooks would effect a seizure, Brooks' "slowed movement," or his "hobbling" and "limping" from the shooting, should have been sufficient to meet this added requirement. *Terry,* 392 U.S. at 19, n. 16, 88 S.Ct. at 1879 (suspect need not be arrested to effect seizure, merely restrained "in some way").

D. A Writ Of Certiorari Should Issue Because:

1. Standards Applicable To Seizure By The Use Of Deadly Force Are Important Matters Of Constitutional Law

Disputes regarding excessive force and the admissibility of evidence resulting from physical seizures of

suspects "occur with considerable frequency, which means that the fundamental question of what it takes to constitute a 'seizure' within the meaning of the Fourth Amendment is a question of real importance." 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.4(a), p. 427 (4th Ed. 2010). This case has significant constitutional implications for both the civil (42 U.S.C. § 1983) and criminal law (suppression of evidence). Furthermore, the 10th Circuit's decision erroneously exempts from constitutional purview deadly force cases in which suspects escape. Delineating the proper proscriptions on, and the protections afforded to those who suffer, the application of deadly force by law enforcement is among the most important constitutional functions this Court performs.

2. The 10th Circuit's *Brooks* Decision Conflicts With This Court's Seizure Precedent

The *Brooks* decision rests on two wayward premises: (1) that *Hodari's* seizure standard is dismissible dicta, and (2) that an unsuccessful effort to arrest by shooting a fleeing suspect in the back is nothing more than a "show of authority." The 10th Circuit's premises conflict with *Hodari* and other applicable precedent from this Court.

a. The 10th Circuit's *Brooks* Decision Conflicts With *Hodari* By Characterizing Its Seizure Standard As Dicta

Hodari's seizure standard is not dicta. Dicta are discussions of "abstract and hypothetical situations not before the court." *Connecticut v. Doehr,* 501 U.S. 1, 30 (1991). Before the *Hodari* court was a claim that evidence discarded during a police pursuit should be suppressed, which hinged on whether the suspect was seized at the time the police gave chase, or not until he was physically tackled. In *Hodari,* this Court stated that "[t]he narrow question before [it was] whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield." *Hodari,* 499 U.S. at 626. This question necessitated the resolution of the question: What police conduct effects a seizure? The Court answered the question by ruling that a seizure occurs *either* by the application of physical force with the intent to restrain *or* "when that is absent" by a successful show of authority. *Hodari,* 499 U.S. at 626.

This resulting standard is set forth *not* during the *Hodari* court's discussion of the Fourth Amendment's common law underpinnings, but in succeeding paragraphs where the Court applies the standard to the facts of the case. *Hodari,* 499 U.S. at 625, 626, 111 S.Ct. at 1550, 1551. *Hodari's* binary physical force/show of authority seizure standard is, thus, not an "abstract or hypothetical" proposition because it was central to resolving the question before the Court

of whether Hodari had been seized, and, if so, whether seizure occurred when pursuit commenced or not until police made physical contact. Characterizing *Hodari's* seizure standard as dicta places the 10th Circuit's *Brooks* decision in diametric conflict with this Court's controlling seizure precedent.

b. The 10th Circuit's *Brooks* Decision Conflicts With This Court's Seizure Precedent By Analyzing The Shooting Of A Suspect As A "Show Of Authority"

Hodari expressly held that a "show of authority" occurs "where [physical force] is absent." *Hodari,* 499 U.S. at 626, 111 S.Ct. at 1551. Where, as here, physical force is present, shooting a suspect in the back is not analyzed as a "show of authority." Of *Hodari's* two identified modes of seizure – (1) the application of physical force with the intent to restrain, and (2) a show of authority – the former effects a seizure "by the slightest application of physical force, despite the arrestee's escape," while only the latter requires "submission to the assertion of authority." *Hodari,* 499 U.S. at 625, 626, 111 S.Ct. at 1550, 1551. No more is required to satisfy *Hodari's* physical force seizure standard than the fact that Brooks was hit by a bullet meant to stop him. *Compare HODARI* SEIZURE ANALYSIS FLOW CHART *with BROOKS* SEIZURE ANALYSIS FLOW CHART, Appendix at 54.

Since a physical force seizure does not require "submission," the 10th Circuit was incorrect in stating that "Supreme Court precedent . . . instructs [that] physical touch (or force) must terminate the suspect's movement" or result in the "acquisition of physical control" before the force applied will be deemed a seizure. *Brooks,* 2010 WL 3122800 at *9; Appendix at 21-22. But since this is the standard the *Brooks* court applied in this case, it erroneously concluded that Brooks had not been seized by Gaenzle's gunshot.

c. The 10th Circuit's *Brooks* Decision Conflicts With This Court's Seizure Standards By Requiring "Physical Control" Or Other Conditions Synonymous With Arrest As A Condition Precedent To A Physical Force Seizure

The 10th Circuit's *Brooks* decision fell into the trap anticipated by *Brower's* concurring Justices, who feared that courts would reflexively, and erroneously, read the decision's "physical control" dicta to mean that "physical control" would become "an essential element of every seizure" in every case. *Brower,* 489 U.S. at 600, 109 S.Ct. at 1383. By holding that the "slightest" application of physical force effects a seizure even if police are "ultimately unsuccessful" at acquiring physical control, *Hodari* rejected outright any inference in *Brower* that the acquisition of physical control is a condition precedent to effecting a

physical force seizure. *Hodari,* 499 U.S. at 625, 626. Since *Brower* post-dates *Hodari,* the 10th Circuit erred when it "reconciled" *Brower* with *Hodari* by affording *Brower's* physical control dicta primacy over *Hodari's* explicit seizure standard. *Brooks,* 2010 WL 3122800 at *7; Appendix at 18; *Williams v. Taylor,* 529 U.S. 362, 407, 120 S.Ct. 1495, 1520 (2000) (it is an "unreasonable application of this Court's precedent" to "unreasonably extend a legal principle from our precedent [*Brower*] to a new context where it should not apply").

d. The 10th Circuit's *Brooks* Decision Conflicts With This Court's Seizure Precedent By Analyzing The Shooting Of A Suspect As An "Attempted Seizure"

Although the *Brooks* decision is correct in generally observing that attempted seizures are beyond the scope of the Fourth Amendment, it improperly characterizes shooting at and striking a suspect who escapes as an "attempted seizure." Attempted seizures, as identified and defined by this and other courts, are events "where [physical force] is absent." *Hodari,* 400 U.S. at 626; 111 S.Ct. at 1551. Non-physical assertions of police authority include verbal commands to "Stop!" (*Hodari*), flashing lights on a police vehicle pursuing or attempting to pull over a vehicle (*Brower, Lewis*), pointing a gun at a suspect without shooting him (*Reeves*), or shooting at but not hitting a suspect (*Cameron, Keryte*). Since physical

force was present in this case, shooting Brooks was no "attempted seizure." *Hodari,* 400 U.S. at 626, 111 S.Ct. at 1551.

Despite its reliance on *Lewis* for the general proposition that attempted seizures are beyond the Fourth Amendment's scope, the 10th Circuit does not explain how *Lewis* supports the specific proposition that shooting a suspect in the back is an "attempted seizure." *Brooks*, 2010 WL 3122800 at *7; Appendix at 17. *Lewis* simply held that a suspect who is killed by means not intentionally applied by police was not physically seized by authorities. *Lewis,* 523 U.S. at 844, 118 S.Ct. at 1715. *Lewis* did not hold that a suspect who is injured by means intentionally applied by police is not seized because the effort to thereby arrest was unsuccessful. *Lewis* does not support the 10th Circuit's view that shooting Brooks in the back was merely an "attempted seizure."

3. The 10th Circuit's Determination Exempts From Constitutional Purview Police Shootings In Which Suspects "Escape" Or Are Not Arrested

The 10th Circuit's *Brooks* decision has carved out a heretofore non-existent exception to police shootings: so long as the suspect escapes, whether by the success of his own exertions or the apathy of police who do not give chase, no police shooting of the suspect will be subject to Fourth Amendment scrutiny. This Court's precedent does not suggest that escape exonerates police from constitutional

wrongdoing committed in the act of unsuccessfully foiling the escape. To the contrary, *Brower* expressly held that the suspect's decision to flee will not justify the use of unconstitutional means to prevent his escape. *Brower*, 489 U.S. at 595, 109 S.Ct. at 1380-81.

Hinging the constitutionality of a physical force seizure on the success of the effort to thereby arrest creates a conspicuous constitutional loophole that threatens both civil constitutional enforcement remedies and the efficacy of the exclusionary rule. Police can choose to not arrest persons upon whom they have visited excessive force, or can allow suspects who have dropped incriminating evidence incident to an illegal bodily seizure to "escape," and thereby evade the consequences of unconstitutional behavior. Excluding physical force seizures from constitutional purview simply because an implicated police officer elects not to pursue or arrest a suspect is a loophole that is not condoned anywhere in this Court's seizure jurisprudence.

4. The Conflict Between The 10th Circuit's Seizure Standard And The 11th, 8th, 7th, 6th, And 3rd Circuits' Seizure Standards Impairs The Uniform Application Of Fourth Amendment Principles Across The Country

The 10th Circuit's *Brooks* decision is an aberration from how the federal appellate courts interpret and apply *Hodari*. Unlike the 11th, 8th, 7th, 6th, and 3rd Circuits, the 10th Circuit does not recognize that

Hodari enunciated a controlling seizure standard. Ignoring *Hodari* brings the 10th Circuit's *Brooks* decision in conflict with fellow circuit courts by imposing conditions precedent on seizures not found in other circuit court opinions, namely requiring that law enforcement's efforts to arrest be successful.

a. Circuit Courts Recognize That *Hodari* Enunciated A Definitive Seizure Standard But The 10th Circuit Treats *Hodari's* Standard As Dicta

The 3rd Circuit in *Brown* readily recognizes the definitive character of *Hodari's* seizure standard, paraphrasing it as follows:

> A seizure occurs when there is either (a) "a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful," or (b) submission to "a show of authority." Put another way, when a seizure is effected by even "the slightest application of physical force," it is immaterial whether the suspect yields to that force.

Brown, 448 F.3d at 245, *quoting Hodari,* 499 U.S. at 625, 626, 111 S.Ct. at 1550. And in *Schulz v. Long,* 44 F.3d 643, 647 (8th Cir. 1995), the court said "*Hodari D. defines* what constitutes a seizure for Fourth Amendment purposes," (emphasis added). *Sargent,* 150 Fed.Appx. at 474 ("*Hodari D.* requires that police *either* physically touched Sargent to restrain him *or* . . . engaged in a show of authority that 'in some way restrained [Sargent's] liberty'"). But what is

definitive for the 8th, 6th, and 3rd Circuits is mere "common law dicta" to the 10th. Treating *Hodari* as dismissible dicta places the 10th Circuit at odds with other circuits.

b. Circuit Courts That Recognize *Hodari's* Seizure Standard Do Not Condition A Physical Force Seizure On The Success Of The Effort To Arrest

Like the 3rd Circuit in *Brown,* the 11th Circuit reads *Hodari* to mean that it is "immaterial" to the seizure determination whether a suspect is arrested subsequent to the application of physical force. *Vaughan,* 343 F.3d at 1329, n. 5, *quoting Hodari,* 499 U.S. at 626, 111 S.Ct. at 1550. It is sufficient for a seizure in the 11th Circuit (as well as the 8th and 6th) if the suspect is "hit by a bullet meant to stop him." *Vaughan,* 343 F.3d at 1323; *Fisher,* 234 F.3d at 318-19. By contrast, in the 10th Circuit, which now classifies shooting a suspect who subsequently escapes as a "show of authority," a seizure requires that a suspect be *stopped by a bullet meant to hit him.*

Unlike the 10th Circuit, circuits that properly apply *Hodari* as a disjunctive standard do not look to events *after* the application of physical force to determine if the force applied effected a seizure. In the 11th, 8th, and 6th Circuits, a seizure occurs the moment a bullet impacts its intended target. *Carr,* 338 F.3d at 1268 ("The seizure occurred *when* Carr

was struck by the bullet from Officer Fortson's gun"); *Cole*, 993 F.2d at 1332 (driver "was not seized until he was *struck* by the shot"); *Ludwig*, 54 F.3d at 471 (arrestee seized "*when* [the officer] attempted to hit Ludwig with the squad car" and "*when* [he] was ultimately shot"); *Sargent*, 150 Fed.Appx. at 474-75 (suspect "was seized *when* [the officer] shot him"); *Fisher*, 234 F.3d at 318-19. Except for the *Hodari*-denying 10th Circuit, the fact of being shot, not the fact of being stopped, is determinative of a physical force seizure in the circuit courts of appeals.

Thus, circuit courts correctly view *Hodari's* restraint element simply as a matter of the officer's intent, and not as a condition that the target must actually experience, in order to seize a suspect by shooting him. *Ciminillo*, 434 F.3d at 466 (beanbag shot that struck plaintiff was a seizure because officer "*intended* to stop Ciminillo from coming any closer"); *Fisher*, 234 F.3d at 318-19 (passenger seized when shot because officer "intended to stop the car"); *Vaughan*, 343 F.3d at 1323 (suspect seized when "hit by a bullet *meant* to stop him"); *Sargent*, 150 Fed.Appx. at 474 ("*Hodari D.* requires that police . . . physically touched Sargent *to restrain* him"); *Carr*, 338 F.3d at 1268 ("it is [the officer's] *intent* and the physical contact of the bullet that governs our . . . seizure analysis"). Requiring that officers succeed in effecting the restraint *intended* by the application of physical force is a condition precedent on a physical force seizure not imposed by the circuit courts that recognize and apply *Hodari's* seizure standard.

c. The 10th Circuit's Refusal To Recognize *Hodari's* Seizure Standard Frustrates The Uniform Application Of The Law

It is not surprising that the 10th Circuit's *Brooks* decision cites no authority from other circuits supportive of its holding because no other federal circuit courts have held that *Hodari's* seizure standard is dismissible dicta. Consequently, no other federal circuit courts have held that shooting a suspect in the back is a "show of authority." These conflicts in standards and policy between the 10th and other circuits will result in the disparate application and enforcement of the law across the country. Removing physical force targets from constitutional purview, if they succeed in fleeing, exempts police in the 10th Circuit from civil liability they would face in other circuits, and makes evidence admissible in the 10th Circuit that would be suppressed in other circuits.

One need only look at *Bradley* to see that police officers occasionally fire unwarranted shots at innocent citizens. Confused citizens under fire might properly judge flight as the best course of action to preserve their safety or lives, but they will have no excessive force remedy in the 10th Circuit if they successfully flee. One need only look at *Dupree* to see that police officers sometimes randomly, and without proper cause, seize citizens, who might flee and discard evidence out of fear of an unjustified police encounter. In the 10th Circuit the fruits of such unlawful seizures will be admissible if a citizen

succeeds in fleeing, only to be arrested later for evidence the police had no original probable cause to believe he or she possessed. Such disparate outcomes from one circuit to another cannot be tolerated consistent with constitutional aspirations for equal protection of the law.

5. *Hodari's* Bright Line Physical Force Seizure Standard Provides A Readily Applicable Rule That Protects Society's Interest In Discouraging Unnecessary, Non-Consensual Touching Without Impairing Law Enforcement Functions

Hodari's physical force seizure standard is precise and simple: any application of physical force intended to restrain is a seizure, even if the subject escapes. Officers in the field can readily apply this standard, readily knowing that once they "lay hands" on, or shoot, a suspect with the intent to restrain, they have effected a seizure, and readily knowing that if they lack probable cause or reasonable suspicion, evidence discovered incident to that seizure will be excluded. *Hodari,* 499 U.S. at 626; *Dupree,* 2010 WL 3063290 at *12. Given society's interest in deterring batteries upon citizens incident to police efforts to investigate or arrest, movement-based standards – those focused on "control" or "termination" of movement – unnecessarily complicate physical force seizure determinations with "all sorts of ifs, ands, and buts requiring the drawing of subtle nuances and hairline distinctions." LaFave, *"Case-By-Case Adjudication" Versus "Standardized*

Procedures:" The Robinson Dilemma, 1974. The public's interest in deterring bodily intrusion by government agents demands a clear, readily applicable standard that movement-based standards do not provide.

Movement-based standards are ill-suited to physical force seizures for three reasons: (1) they place greater constitutional importance on interruption of movement than on the bodily intrusion of police applications of deadly force; (2) they inherently contain arbitrary distinctions and insoluable conflicts not readily applicable by police or courts, *i.e.* conflicts over whether the suspect "stopped" as a result of the application of physical force and, if so, whether the duration of the "stop" was "significant;" and (3) they game law enforcement's usage of physical force into calculations of how much force can be applied without "stopping" a suspect "too much." The 10th Circuit's recent unpublished decision in *Lemery v. Beckner*, 323 Fed.Appx. 644 (10th Cir. 2008), demonstrates the dilemma inherent in hinging physical force seizure determinations on interrupted movement.

In *Lemery* a college student seeking law enforcement's assistance during a street riot was shot in the eye by a pepper gun. The 10th Circuit ruled police had seized Lemery, not because police shot and injured his eye, but because the shot caused a "momentary termination" of Lemery's movement. *Lemery*, 323 Fed.Appx. at 649; *Brooks*, 2010 WL 3122800 at *10; Appendix at 25-26. *Lemery* illustrates the 10th Circuit's peculiar tendency to constitutionally prioritize

interrupted movement over physical intrusion in physical force seizure situations. *Hodari's* physical force seizure standard does not require any actual restraint, only that force be applied with the *intent* to restrain. *Hodari* does not require even "momentary termination" of movement for a seizure if a person is shot by the police. *Brooks* and *Lemery* expose the need for this Court to reaffirm *Hodari's* bright line physical force seizure rule.

6. The 10th Circuit's *Brooks* Decision Is Legally And Factually An Appropriate Case To Firmly Establish The Principle That Shooting A Fleeing Suspect Is A Seizure By Application Of Physical Force And Not Merely A "Show Of Authority" Or "Attempted Seizure"

The *Brooks* case is well-suited to serve as the vehicle for resolving the explicit conflict that exists between the 10th Circuit and the 11th, 8th, and 6th Circuits, and implicit conflict between the 10th Circuit and the 7th and 3rd Circuits, because it starkly presents the question of whether shooting and hitting a fleeing suspect is merely a "show of authority" if the effort to arrest is not successful. The facts material to the seizure question are not disputed: Gaenzle shot Brooks in the back as he climbed the fence to prevent his escape, Gaenzle and Smith did not pursue Brooks, and Brooks escaped. Did the failure to pursue or arrest Brooks render the shooting a mere "show of authority," or was shooting

Brooks a seizure by application of physical force despite Brooks' escape? This Court should grant certiorari in this case to resolve the important question now dividing the circuits of whether the fact that a shot suspect who is not thereafter promptly arrested places the shooting outside constitutional physical force seizure protections.

CONCLUSION

The concurring Justices in *Brower* feared that the decision might be read to require "physical control" in all cases to effect a seizure. That fear has materialized in the 10th Circuit's *Brooks* decision. *Hodari* should have put to rest any notion that "stopping" or acquiring "physical control" over a suspect is a condition precedent to a physical force seizure, but the 10th Circuit dismisses *Hodari's* seizure standard as mere dicta. In order to correct the resulting conflict

in the circuits, and the constitutional mischief that will surely come to pass in the 10th Circuit if the *Brooks* decision is allowed to stand, Petitioner Keith C. Brooks requests that a writ of certiorari be issued in this case.

Respectfully submitted.

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___ F.3d ___, 2010 WL 3122800 (C.A.10 (Colo.))

United States Court of Appeals,
Tenth Circuit.
Keith Clayton BROOKS, Jr., Plaintiff-Appellant,
v.
Steve GAENZLE, Individually and in His Official Capacity as Deputy; Paul Smith, Individually and in His Official Capacity as Deputy; Terry Maketa, Individually and in His Official Capacity as Sheriff; El Paso County Sheriff's Department; El Paso County, Defendants-Appellees.
No. 09-1489.

Aug. 10, 2010.

Paul S. **Swedlund** of Baker Hostetler LLP, Denver, CO, for Plaintiff-Appellant.

Gordon L. Vaughan of Vaughan & DeMuro, Colorado Springs, CO, for Defendants-Appellees.

Before O'BRIEN, BRORBY, and GORSUCH, Circuit Judges.

BRORBY, Circuit Judge.

Appellant Keith Clayton Brooks, Jr., appeals the district court's grant of summary judgment in favor of Appellees Steve Gaenzle and Paul Smith – deputies with the El Paso County, Colorado Sheriff's Department – in his civil rights actions against them pursuant to 42 U.S.C. § 1983 and his state tort action

pursuant to Colorado Revised Statute § 13-80-119.[1] The crux of Mr. Brooks's appeal centers on his argument Deputies Gaenzle and Smith violated his Fourth Amendment right to be free from unreasonable seizure by use of excessive force when they shot him after he fled the scene of a violent crime – a burglary involving a gun used to shoot close range at the deputies when they responded to a call reporting the burglary. Mr. Brooks claims the district court erred in ruling no Fourth Amendment seizure occurred and, even if a seizure occurred, Deputy Gaenzle acted with objective reasonableness in shooting Mr. Brooks under the circumstances presented. He also contests the district court's grant of summary judgment on his federal action against the deputies for conspiracy and malicious prosecution and his state tort action against them for assault and battery. We exercise jurisdiction under 28 U.S.C. § 1291, affirm the district court's grant of summary judgment on the federal actions, and decline pendent jurisdiction on the state action, thereby reversing and remanding it to the district court with instructions to dismiss it without prejudice.

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[1] The other named defendants in Mr. Brooks's action included the El Paso County Sheriff's Department, El Paso County Sheriff Terry Maketa, and the El Paso County Board of Commissioners. The parties later stipulated to dismissal of the claims against them.

I. Factual Background

The underlying, undisputed facts surrounding Mr. Brooks's appeal are more fully set forth in the district court's order granting summary judgment in favor of the deputies.[2] We summarize only the material, undisputed facts considered for our disposition of this appeal.

On October 17, 2005, Mr. Brooks and Nick Acevedo forcibly broke into a garage in El Paso County, Colorado, with the intent of burglarizing the attached house. Someone in the neighborhood contacted law enforcement, after which Deputies Gaenzle and Smith arrived on the scene. Both deputies heard what sounded like two or three people talking inside, so they announced their presence and entered the garage, where they saw a white male, later identified as Mr. Acevedo, run into the house and block the door with his body. As the officers tried to break down the door, someone from inside the house fired a shot which went through the door, barely missing the officers' heads and shoulders and spraying them with shrapnel. After the deputies left the garage and entered the back yard to ascertain if either of them was injured, they observed a black male flee the house and begin to climb a fence. The fleeing suspect was Mr. Brooks.

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[2] Like the district court, we rely on the parties' statement of undisputed facts, as amended by Mr. Brooks in his response to the deputies' motion for summary judgment.

Deputy Gaenzle yelled "stop" as Mr. Brooks began to climb the fence.[3] As Mr. Brooks continued to climb the fence, Deputy Gaenzle shot and struck him. Despite being shot, Mr. Brooks continued his flight by climbing over the fence and fleeing the scene. He joined Mr. Acevedo, who had also fled, and together they escaped in a car parked nearby. Three days later, law enforcement authorities found Mr. Brooks in a Colorado Springs, Colorado mall parking lot and, after chasing him to a nearby home, apprehended him. Thirteen days later, police shot and killed Mr. Acevedo during a gun fight in which he died holding the gun used to fire through the door during the burglary with Mr. Brooks.

With respect to the most contentiously disputed facts, Mr. Brooks claimed he never used or possessed a weapon during the burglary. However, both Deputies Gaenzle and Smith stated they saw a gun in his possession as he fled the house. In addition, the deputies claim they did not know whether the shot was fired by the person blocking the door with his body or someone else in the house, while Mr. Brooks contends it was Mr. Acevedo and they should have known it was him. While the parties dispute these facts, they are immaterial to our disposition on appeal of the issues presented.

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[3] Mr. Brooks states he did not hear such a command. Similarly, while the record indicates Mr. Brooks was hit by a bullet in the buttock, he contends it was his lower back area. Neither of these disputed facts is material to our disposition.

Following his arrest, the State of Colorado charged Mr. Brooks with seven counts, including: (1) criminal attempt to commit murder in the first degree, after deliberation, of a police officer; (2) criminal attempt to commit murder in the second degree; (3) assault in the first degree; (4) first degree burglary – assault or menace; (5) first degree burglary – deadly weapon; (6) menacing; and (7) possession of a weapon by a felon. The jury convicted Mr. Brooks of all charges except the count for possession of a weapon by a felon. The jury also found Mr. Brooks did not use or possess a firearm for the purpose of imposing a sentence enhancement.

Thereafter, Mr. Brooks brought the instant civil action against Deputies Gaenzle and Smith. In his second amended complaint, Mr. Brooks raised three claims for damages, including allegations of: (1) a violation of 42 U.S.C. § 1983 based on the deputies' use of excessive force in seizing him by gunshot during the burglary; (2) a violation of 42 U.S.C. § 1983 based on their alleged malicious prosecution and a violation of 42 U.S.C. § 1985 for their alleged conspiracy to make false reports of his possession of a gun;[4] and (3) assault and battery by Deputy Gaenzle constituting an actionable tort under state law. Thereafter, the district court granted the deputies' motion for summary judgment on each claim. Mr.

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[4] Although Mr. Brooks initially raised his conspiracy claim expressly under 42 U.S.C. § 1985, he later proceeded with the claim under § 1983, as discussed hereafter.

Brooks now appeals. We recount the district court's resolution of each of Mr. Brooks's claims and the issues the parties raise on appeal as follows in our discussion of those issues.

II. Discussion

A. Excessive Force Issue

In his first claim for relief under 42 U.S.C. § 1983, Mr. Brooks asserted Deputies Gaenzle and Smith violated his Fourth Amendment right to be free from unreasonable seizure when they used excessive and deadly force in shooting him as he fled. In ruling on the deputies' motion for summary judgment, the district court held no excessive force occurred based on its determination Mr. Brooks's shooting did not constitute a seizure and its alternative determination the force used was objectively reasonable under the circumstances presented.

In addressing the seizure issue, the district court relied on the Supreme Court's decision in *Brower v. County of Inyo,* 489 U.S. 593, 595-96, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), for the proposition a seizure only occurs if the government's actions "restrain the movement of the suspect." It further observed:

> For a seizure to occur, the government does not have to literally stop the suspect in his tracks or freeze him in place. But, the plain meaning of the word seizure and various Supreme Court interpretations indicate that the government must do something that

> gives it the opportunity to control the suspect's ability to evade capture or control. *See Brower,* 489 U.S. at 595-96 [109 S.Ct. 1378] ("Violation of the Fourth Amendment requires an intentional acquisition of physical control."). . . . In other words, the government must have substantially precluded the suspect's ability to loose himself from the government's control.

Apt.App. at 19. It also observed that in *California v. Hodari D.,* 499 U.S. 621, 628-29, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), the Supreme Court determined no seizure occurred during the course of a foot chase because the government's "'show of authority' did not produce his stop." Apt.App. at 20. Similarly, it noted in *Bella v. Chamberlain,* 24 F.3d 1251, 1255 (10th Cir.1994), this court held shooting and striking a helicopter operated by an innocent hostage, but failing to seriously encumber his ability to flee or evade restraint, did not amount to a Fourth Amendment seizure. Applying the holdings of these cases to the instant case, the district court determined no seizure occurred when Deputy Gaenzle shot and struck Mr. Brooks because he managed to continue climbing the fence without the shot "even temporarily halt[ing]" his escape; eluded arrest for three days; and "still had enough spring in his step to evade police in the mall parking lot" before being chased and apprehended at a nearby home. Apt.App. at 21-23.

In making its determination, the district court also considered the cases relied on by Mr. Brooks. It pointed out Mr. Brooks relied on mere dicta in *Bella* to assert the shooting of a fleeing suspect automatically or per se constitutes a Fourth Amendment seizure. *See* 24 F.3d at 1255. In addressing the other cases on which Mr. Brooks relied, including *Brower, Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); *Cole v. Bone,* 993 F.2d 1328 (8th Cir.1993); and *Lemery v. Beckner,* 323 Fed.Appx. 644 (10th Cir.) (unpublished opinion), *cert. denied,* ___ U.S. ___, 130 S.Ct. 416, 175 L.Ed.2d 271 (2009), it pointed out the officers' use of deadly force in those cases actually terminated the fleeing suspects' movement, either by killing them or immediately or momentarily subduing them. It reasoned the holding in those cases would likely have been different if the fleeing suspects had, like Mr. Brooks, survived their respective encounters with the police and eluded arrest by escaping from the scene. In contrast, it pointed out the outcome of Mr. Brooks's case would likely have been different if Deputy Gaenzle's shot had hobbled or injured him, thereby preventing him from climbing over the fence and escaping with Mr. Acevedo. While it stated the gunshot "presumably" "pain[ed]" Mr. Brooks or "slowed the pace of his escape," it did not bring him within the government's control. Apt.App. at 23. In holding no seizure occurred, the district court concluded Deputy Gaenzle's gunshot may have injured Mr. Brooks, but it clearly did not produce a stop or terminate his movement.

Alternatively, the district court determined that, even if Mr. Brooks could prove a seizure occurred, the deputies used an objectively reasonable degree of force under the circumstances presented. In making this determination, it pointed out law enforcement officers may reasonably use deadly force when they have probable cause to believe a suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, and, at the time Deputy Gaenzle shot him, Mr. Brooks was involved in the commission of an inherently violent crime where, during the course of a burglary, someone shot at the deputies at close range before fleeing. The district court held Deputy Gaenzle acted reasonably because a reasonable officer in his position would have, under the circumstances presented, feared for his safety and the safety of others.

In making this determination, the district court rejected Mr. Brooks's claim Deputies Gaenzle and Smith failed to use objectively reasonable force: (1) because the jury acquitted him of the charge of being a felon in possession of a weapon; and (2) based on his allegation he did not possess a weapon or participate in the violent acts for which he was convicted, but merely acted in complicity with Mr. Acevedo. In rejecting these arguments, the district court noted that, regardless of whether Mr. Brooks actually possessed a gun or the fact a jury acquitted him of possession of a weapon, he was undisputably involved in a crime where someone involved in the burglary nearly shot the two deputies in the face and that the

law does not require he actually carry the gun or commit the shooting.

In addition, the district court determined Mr. Brooks's reliance on Deputy Gaenzle's statement – that he believed Mr. Brooks possessed a handgun, which was critical to his decision to use deadly force – was merely a subjective standard instead of the requisite objective reasonableness standard in viewing whether a reasonable officer would have used such force under the circumstances presented. Based on this assessment, the district court concluded sufficient undisputed facts existed in the record to support Deputy Gaenzle's use of deadly force, notwithstanding his own subjective impression of the situation. Having made a determination the shooting of Mr. Brooks did not constitute a seizure and, alternatively, the force used was objectively reasonable under the circumstances presented, the district court held Deputies Gaenzle and Smith did not use excessive force in violation of Mr. Brooks's Fourth Amendment right to be free from unreasonable seizure.

On appeal, Mr. Brooks contends the district court erred in its analysis and resolution of his excessive force claim with regard to both its holding no seizure occurred and its alternative holding Deputy Gaenzle used objectively reasonable force under the circumstances presented. In support of his seizure argument, Mr. Brooks relies on the same or similar arguments he made in opposing the deputies' motion for summary judgment, including his reliance on *Hodari, Bella, Cole*, and *Lemery,* and another case,

Vaughan v. Cox, 343 F.3d 1323 (11th Cir.2003), for the proposition intentional physical deadly force to restrain a suspect's movement is sufficient per se to constitute a seizure, regardless of whether his movement was "substantially precluded" or "seriously encumbered." In making this argument, Mr. Brooks asserts *Hodari* stands for the proposition the "'application of physical force to restrain movement, even when it is ultimately unsuccessful,' is a seizure." 499 U.S. at 626, 111 S.Ct. 1547. He contends this was accomplished when he was struck by the bullet. He concludes that because Deputy Gaenzle applied physical deadly force with the intent of restraining his movement, a seizure occurred, regardless of whether his "attempted apprehension was 'ultimately unsuccessful'" or he still had "spring in his step" days later at the time of his arrest. He alternatively contends his "'pain[ed] or slowed' movement," as referenced by the district court, sufficiently constitutes a seizure, as it restrained his movement.

As to his argument concerning the objective reasonableness of the force applied, Mr. Brooks again relies on Deputy Gaenzle's subjective statement concerning his assessment of the risk he posed, claiming such a subjective assessment may be considered. He also reasserts his claim his mere involvement in the burglary, where a shot was discharged at the deputies, is insufficient to establish he posed a threat to either Deputy Gaenzle or the community at large.

We begin our discussion with our standard of review, as set forth in *Reeves v. Churchich*, 484 F.3d 1244 (10th Cir.2007):

> We review a grant of summary judgment based on qualified immunity de novo, applying the same legal standard used by the district court. Summary judgment should be granted if the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In conducting our review, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party.
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> In an action under section 1983, individual defendants are entitled to qualified immunity unless it is demonstrated that their alleged conduct violated clearly established constitutional rights of which a reasonable person in their positions would have known. Once a defendant has raised qualified immunity as an affirmative defense, the plaintiff bears the heavy two-part burden of demonstrating that (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established at the time of the alleged conduct.

Id. at 1250 (internal quotation marks and citations omitted). In this case, Deputies Gaenzle and Smith raised the affirmative defense of qualified immunity. Thus, the "threshold question" is whether "the officer[s'] conduct violated a constitutional right," when

they shot him as he fled. *Scott v. Harris*, 550 U.S. 372, 377, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

Turning to whether a constitutional right was violated, "[t]he Fourth Amendment protects individuals against 'unreasonable searches and seizures.'" *Bella*, 24 F.3d at 1255. "To state a claim of excessive force under the Fourth Amendment, a plaintiff must show both that a 'seizure' occurred and that the seizure was 'unreasonable.'" *Id.* The issue of what constitutes a "seizure" has been repeatedly addressed by the Supreme Court, from which we take instruction.

In *Terry v. Ohio*, the Supreme Court held [a] "seizure" triggering the Fourth Amendment's protections occurs only when the officer has, "by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen. . . ." 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In *United States v. Mendenhall*, the Supreme Court further explained "a person is 'seized' only when, by means of physical force or a show of authority, *his freedom of movement is restrained.*" 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (emphasis added). In *Garner*, the Court applied this principle to a suspect flight situation where a police officer's fatal shooting of a fleeing suspect was deemed to constitute a Fourth Amendment seizure on grounds that "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." 471 U.S. at 7, 105 S.Ct. 1694. The *Garner* Court also stated "there can be no question that *apprehension by*

the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[5] *Id.* (emphasis added). Thus, from *Terry, Mendenhall*, and *Garner*, one can reasonably conclude a "seizure" requires restraint of one's freedom of movement and includes apprehension or capture by deadly force. However, they do not stand for the proposition, as Mr. Brooks contends, that use of deadly force alone constitutes a seizure. Instead, it is clear restraint of freedom of movement must occur.

Subsequent Supreme Court cases determining what constitutes a "seizure" in flight situations also do not support Mr. Brooks's contention use of deadly force against him is enough alone to constitute a "seizure." In *Brower*, a suspect was killed when the stolen car he was driving at high speeds to elude police crashed into a police roadblock intentionally put in place to stop him. 489 U.S. at 594-95, 598-99, 109 S.Ct. 1378. The Supreme Court determined this constituted a seizure, reasoning a seizure occurs if the person is "stopped by the very instrumentality set in motion or put in place" to achieve that result. *Id.* at 599, 109 S.Ct. 1378. In making this determination, the Supreme Court instructed:

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally

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[5] "Apprehension" generally means "capture," "arrest," or "seizure in the name of the law." *See Black's Law Dictionary* 97 (7th ed.1999); *Webster's II New Riverside Univ. Dictionary* 119 (1984 ed.).

> caused termination of an individual's freedom of movement (the innocent passerby), nor even where there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental *termination of freedom of movement through means intentionally applied.*

Id. at 596-97, 109 S.Ct. 1378 (emphasis added). It further explained, a "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." *Id.* at 596, 109 S.Ct. 1378 (emphasis added). Applying these principles, the Court concluded the complaint sufficiently alleged the police "sought to stop [Mr.] Brower by means of a roadblock and succeeded in doing so." *Id.* at 599, 109 S.Ct. 1378 (emphasis added). Applying these principles to the instant case, it is clear the gunfire which struck Mr. Brooks was intentional and intended to stop him, but he was not "stopped by the very instrumentality set in motion" for that purpose and, instead, he continued to flee and elude authorities for days. Under the circumstances, we cannot say authorities gained "intentional acquisition of physical control" over Mr. Brooks. *Id.* at 596, 109 S.Ct. 1378.

Similarly, in *Hodari,* the Supreme Court determined a police officer's pursuit of a suspect constituted a show of authority enjoining him to halt, but no seizure occurred until the police officer tackled him because, until then, he did not yield or submit to the

officer's show of authority. 499 U.S. at 622-24, 629, 111 S.Ct. 1547. In so concluding, the Court noted "[t]he narrow question before us is whether, with respect to a show of authority *as with respect to application of physical force,* a seizure occurs even though the subject does not yield." *Id.* at 626, 111 S.Ct. 1547 (emphasis added). In determining a seizure did not occur until the physical act of tackling the suspect, it observed the common law connotation of the word "seizure" meant not merely to grasp or apply physical force, but to actually bring an object within physical control. *See id.* at 624, 111 S.Ct. 1547. It then discussed the common law definition of "arrest," which it characterized as "the quintessential 'seizure of the person,'" and pointed out common law defined "arrest" as the "application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee," including "the laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id.* at 624, 626, 111 S.Ct. 1547; *see also Thomas v. Durastanti,* 607 F.3d 655, 663 (10th Cir.2010) (pointing out the Supreme Court's discussion on this point constitutes dicta).

This common law dicta is what Mr. Brooks relies on in stating *Hodari* stands for the proposition a seizure occurs per se when there is, as he asserts, an "'application of physical force to restrain movement, even when it is ultimately unsuccessful.'" 499 U.S. at 626, 111 S.Ct. 1547. In support, he points out the Eleventh Circuit, in *Vaughan,* relied on *Hodari* for

the same proposition. *See* 343 F.3d at 1329 n. 5. We further note the Eleventh Circuit applied the same dicta to conclude a bullet striking a suspect constituted a seizure, even though he was not stopped by the bullet but continued to flee by running to his house. *See Carr v. Tatangelo,* 338 F.3d 1259, 1265, 1268 (11th Cir.2003).

But, in relying on the *Hodari* common law dicta, Mr. Brooks and these cases ignore the *Hodari* Court's further explanation:

> We have consulted the common-law to explain the meaning of seizure. . . . [and] neither usage nor common-law tradition makes an *attempted* seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions.

499 U.S. at 626 n. 2, 111 S.Ct. 1547. As the Supreme Court later clarified, the holding in *Hodari* centered on the proposition "a police pursuit in attempting to seize a person does not amount to a 'seizure' within the meaning of the Fourth Amendment" and its common law discussion merely illustrated the principle "attempted seizures" are beyond the Fourth Amendment's scope. *County of Sacramento v. Lewis,* 523 U.S. 833, 844-45 & n. 7, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Moreover, when read in context and its entirety, *Hodari* clarifies that a seizure cannot occur unless a show of authority results in the

suspect's submission. *See* 499 U.S. at 629, 111 S.Ct. 1547. In addition, as clearly indicated by *Brower* and other Supreme Court precedent reached prior to *Hodari,* some form of intentional acquisition of physical control, through termination of movement by physical force or submission to a show of authority, must occur in flight cases for a seizure to occur. Nothing in the *Hodari* discussion indicates an intent to overrule such precedent. Instead, we have expressly recognized *Hodari* must be reconciled or compared with the holding in *Brower* "that a seizure requires 'intentional acquisition of physical control' and occurs when 'a person [is] stopped by the very instrumentality set in motion or put in place in order to achieve the result.'" *Thomas,* 607 F.3d at 663 (citation omitted).

Following *Hodari* and *Lewis,* the Supreme Court again considered what constitutes a seizure by summarizing, "[a] person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, *terminates or restrains his freedom of movement,* through means intentionally applied." *Brendlin v. California,* 551 U.S. 249, 254, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (internal quotation marks and citations omitted and emphasis added). As to *Hodari* and *Lewis,* it further clarified, "[a] police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise there is at most an attempted seizure,

so far as the Fourth Amendment is concerned." *Id.* As to what constitutes actual "submission," the Supreme Court explained it depends on "the totality of the circumstances – the whole picture," *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), and, as the *Brendlin* Court offered, "what may amount to submission depends on what a person was doing before the show of authority; a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." 551 U.S. at 262, 127 S.Ct. 2400.

Not only have we applied these same principles in considering seizure situations, but none of our holdings suggest the mere use of physical force or show of authority alone, without termination of movement or submission, constitutes a seizure. For instance, in *Reeves,* we determined two individuals were not "seized" for the purpose of a Fourth Amendment violation when law enforcement officers pointed their guns at them and ordered them not to move, but they failed to submit to their assertions of authority. *See* 484 F.3d at 1248-50, 1253-54 & n. 17. In *Latta v. Keryte,* 118 F.3d 693 (10th Cir.1997), we held an officer did not seize a suspect during an interstate pursuit, even though he shot out two of the suspect's tires, given it "did not cause [him] to submit to . . . authority or succeed in stopping him." *Id.* at 700. Likewise, in *Bella,* we determined a seizure did not occur when a law enforcement officer shot at and struck a helicopter operated by an innocent hostage.

24 F.3d at 1254-56. We concluded that while the shots constituted an intentional assertion of authority, they did not cause the hostage to submit or otherwise succeed in stopping him, and therefore, it did not constitute a seizure within the meaning of the Fourth Amendment. *Id.* at 1255-56. Similarly, in this case, the intentional use of deadly force in shooting Mr. Brooks neither prevented his freedom of movement nor otherwise succeeded in stopping him.[6]

While our holding in *Bella* supports the district court's decision Mr. Brooks was not seized by the gunshot, in that case we generally stated *Hodari* stood for the proposition a "'seizure' occurs only when a fleeing person is *physically touched* by police or when he or she submits to a show of authority by police." 24 F.3d at 1255. We also relied on *Hodari* to generally suggest that when law enforcement officers shoot at a fleeing suspect, a "'seizure' occurs only if the shot strikes the fleeing person or if the shot causes the fleeing person to submit to this show of authority." *Id.* It is apparent Mr. Brooks is relying on

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[6] As further illustration, the deputies point out that in our unpublished opinion, *United States v. Quintana-Grijalva,* 332 Fed.Appx. 487 (10th Cir.2009), we came to a similar conclusion. In that case, United States Border Patrol agents pursued individuals in a vehicle as they took evasive action. *Id.* at 489. Once the vehicle was stopped by a barbed wire fence, the driver fled on foot fifty yards before his physical apprehension. *Id.* at 490. Relying on the holding in *Hodari,* we held no seizure occurred before he abandoned his vehicle because he did not submit to the agents' show of authority as they pursued him. *Id.* at 492.

these general statements when citing to *Bella* and *Cole* to support the position "a police officer effects a seizure the moment his bullet strikes a suspect who is his intended target." Apt. Br. at 11-12. But further explanation of *Hodari,* and our discussion of *Hodari* in *Bella,* is required here.

As previously mentioned, in the portion of *Hodari* on which we relied in *Bella,* the Court was discussing common law seizures and arrests to explain the Fourth Amendment could not be stretched to cover attempted seizures by unsuccessful shows of authority, such as a pursuit. *Hodari,* 499 U.S. at 625-27, 111 S.Ct. 1547. In making this point, it stated:

> [Common law] arrest requires either physical force . . . or, where that is absent, *submission* to the assertion of authority. Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest. There can be no arrest without either touching or submission.

Id. at 626-27, 111 S.Ct. 1547 (internal quotation marks and citation omitted). Thus, as we explained in *Bella, Hodari* indicates no seizure can occur unless there is physical touch or a show of authority. But, as other Supreme Court precedent further instructs, such physical touch (or force) must terminate the

suspect's movement, and, alternatively, any show of authority (without touch) must cause submission. Nothing in our reading of the statements in *Hodari* or *Bella* or their holdings causes us to believe that in flight situations mere intentional physical touch constitutes a seizure, absent termination of the suspect's movement.[7] As the district court in the instant case stated, "the plain meaning of the word seizure and various Supreme Court interpretations indicate that the government must do something that gives it the opportunity to control the suspect's ability to evade capture or control." Apt.App. at 19. Unfortunately but understandably, *Hodari* and our general discussion in *Bella* have been incorrectly interpreted by Mr. Brooks to mean his shooting alone constitutes a seizure, without consideration of the fact he continued to flee without the deputies' acquisition of physical control, as demonstrated by the fact he remained at large for days.

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[7] Deputies Gaenzle and Smith suggest using mere "physical touch" to constitute a seizure in flight situations could cause illogical results. To illustrate this point, they assert that if a police officer throws a hand grenade intending to stop a suspect and misses, causing the suspect to continue to flee, no seizure would occur because the officer's show of authority did not cause his submission. In contrast, they point out that if the same police officer throws a snowball and hits the same suspect without stopping him as he flees, a seizure would occur because he was "physically touched." In turn, Mr. Brooks argues a seizure occurs merely from physical touch by a snowball, or even a feather. However, under the *Brower* analysis, neither a touch by a feather nor a snowball would constitute a seizure unless intentional acquisition of control over the suspect occurred.

As to the other cases on which Mr. Brooks relies, the district court aptly noted his successful eluding of the police is different than what occurred in *Brower, Garner*, or *Cole,* where the officers' use of deadly force actually terminated the fleeing suspects' movement, either by killing them or immediately stopping them. *See Brower,* 489 U.S. at 594, 599, 109 S.Ct. 1378; *Garner,* 471 U.S. at 3-4, 7, 105 S.Ct. 1694; *Cole,* 993 F.2d at 1330, 1332-33. Similarly, in *Hodari,* no seizure occurred until the suspect was tackled and thereby stopped. *See* 499 U.S. at 629, 111 S.Ct. 1547. In *Vaughan,* on which Mr. Brooks also relies, a passenger was struck by a bullet fired by police in an attempt to stop him and the driver in a speeding vehicle. 343 F.3d at 1326-27. After the passenger was struck, the driver of the vehicle continued evasive action before losing control and crashing. *Id.* at 1327. The court determined the persons to be stopped in the vehicle were "stopped by the very instrumentality set in motion . . . to achieve that result," when an officer fired his weapon to stop the passenger and driver, and one of those bullets struck the passenger. *Id.* at 1329. But, unlike *Vaughan,* a significant difference exists here because the instrumentality meant to stop Mr. Brooks – the bullet from Deputy Gaenzle's gun – did not stop him, and therefore, the intended result was not achieved.

We are not alone in interpreting Supreme Court precedent as requiring intentional termination of movement or acquisition of physical control in flight situations, regardless of the force applied. *See, e.g.,*

United States v. Bradley, 196 F.3d 762, 768 (7th Cir.1999) (holding "there must be either a show of authority or a use of force" which "must have caused the fleeing individual to stop attempting escape"); *United States v. Hernandez,* 27 F.3d 1403, 1405, 1406-07 (9th Cir.1994) (determining no seizure occurred when officer grabbed suspect, a struggle ensued, and suspect fled, as he "was not seized because he never submitted to authority, nor was he physically subdued" and further holding "[a] seizure does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective"); *Cameron v. City of Pontiac,* 813 F.2d 782, 785 (6th Cir.1987) (holding "[t]he use of deadly force standing alone does not constitute a seizure, and absent an actual physical restraint or physical seizure, the alleged unreasonableness of the officers' conduct cannot serve as a basis for a § 1983 cause of action").

Applying these legal principles concerning flight-type seizures to the instant case, we agree with the district court's assessment Deputy Gaenzle's gunshot may have intentionally struck Mr. Brooks but it clearly did not terminate his movement or otherwise cause the government to have physical control over him. This is evidenced by the fact he continued climbing the fence and eluding arrest for three days, after which, as the district court aptly noted, he "still had enough spring in his step to evade police in the mall parking lot" and cause them to chase him to a nearby house. Apt.App. at 23.

As an alternative argument, Mr. Brooks relies on the district court's pronouncement the gunshot "presumably" "pain[ed]" him or "slowed the pace of his escape" to assert, seemingly for the first time on appeal, his "'pain[ed] or slowed' movement" sufficiently constitutes a seizure.[8] The only case he cites which can be construed so remotely support such a proposition is *Lemery*, an unpublished opinion where we relied on the aforementioned statements in *Hodari* and *Bella* to hold the "momentary" stopping of an individual, with a pepper ball shot to the eye before he walked away unpursued by police, constituted a "'governmental termination of freedom of movement through means intentionally applied.'" *See Lemery*, 323 Fed.Appx. at 649. But in that case, as well as in *United States v. Morgan*,[9] we dealt with

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[8] In his appeal brief, Mr. Brooks states the deputies saw him "hobbling" and "limping" through the neighborhood, but provides no record citation to support his statement. Even assuming his statement is true and construing it in the light most favorable to Mr. Brooks as the nonmoving party, it does not demonstrate he terminated his flight, even momentarily, but merely that the bullet slowed his pace, as suggested by the district court.

[9] In *Morgan*, we determined a person's momentary yielding to an officer's apparent show of authority before fleeing was relevant to our seizure determination. *See* 936 F.2d 1561, 1567 (10th Cir.1991). But, in making our seizure determination, we also relied on the fact the suspect was in a car followed for several blocks by a police car with its overhead lights activated before it pulled over and he exited and verbally responded to the officers' show of authority before fleeing on foot. *Id.* at 1565-67. Moreover, it does not appear, as here, the suspect in *Morgan* continued to elude police for days before his apprehension.

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momentary termination of the suspect's movement, and not pained or slowed movement, as argued here, and Mr. Brooks provides no other citation to authority which supports his contention pained or slowed movement is sufficient to constitute a seizure.

We generally will not address issues not supported by citation to legal authority. *See MacArthur v. San Juan County,* 495 F.3d 1157, 1160-61 (10th Cir.2007). In addition, "[w]e have repeatedly declined to allow parties to assert for the first time on appeal legal theories not raised before the district court,

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While we indicated in *Morgan* that momentary yielding to a show of authority may be relevant to a seizure determination, we recognize other circuits have held momentary termination of movement does not constitute a seizure. *See United States v. Baldwin,* 496 F.3d 215, 218 (2d Cir.2007) (holding to constitute a seizure "a suspect must do more than halt temporarily; he must submit to police authority"); *United States v. Valentine,* 232 F.3d 350, 359 (3d Cir.2000) (stating "[e]ven if [suspect] paused for a few moments and gave his name, he did not submit . . . to the officers' show of authority" until grabbed); *United States v. Washington,* 12 F.3d 1128, 1132 (D.C.Cir.1994) (determining defendant, who briefly stopped and then sped off before officer approached his vehicle, did not submit for purpose of constituting a seizure); *Hernandez,* 27 F.3d at 1407 (declining "to adopt a rule whereby momentary hesitation and direct eye contact prior to flight constitute submission to a show of authority" and concluding that "[s]uch a rule would encourage suspects to flee after the slightest contact with an officer in order to discard evidence, and yet still maintain Fourth Amendment protections").

even when they fall under the same general rubric as an argument presented to the district court." *United States v. A.B.*, 529 F.3d 1275, 1279 n. 4 (10th Cir.2008). As a result, we need not further address Mr. Brooks's argument that pained or slowed movement is sufficient to constitute a seizure.

As to his reliance on *Lemery*, even if we applied its non-precedential holding that a suspect's momentary termination of movement alone, caused by a pepper ball shot, constitutes a seizure, neither the record on appeal nor Mr. Brooks's arguments indicate Deputy Gaenzle's bullet momentarily stopped his escape and, instead, as the district court stated, it did not "even temporarily halt[ ]" it. Apt.App. at 21-22. For these reasons, we agree with the district court's assessment no genuine issue exists as to any material fact, and Deputies Gaenzle and Smith, as the moving parties, are entitled to judgment as a matter of law. Because Mr. Brooks has not demonstrated their alleged conduct violated a constitutional right by means of "seizure," we need not consider the issue of whether the deputies' conduct was objectively reasonable, which is also required for a Fourth Amendment excessive force claim.

B. Malicious Prosecution and Conspiracy/ False Statements

1. Malicious Prosecution

In his second federal claim against Deputies Gaenzle and Smith, Mr. Brooks sought relief, in part,

under 42 U.S.C. § 1983 for their alleged violation of his Fourteenth Amendment due process rights by making false reports of his possession of a gun in order to maliciously prosecute him by charging him with possession of a weapon and seeking a sentence enhancement based on his possession or use of a weapon. In opposing the deputies' motion for summary judgment, Mr. Brooks argued a factual issue existed with respect to whether they made false statements about his possession of a gun as he fled.

The district court agreed a factual dispute existed as to whether the deputies made false statements but determined that such a factual dispute was immaterial to the malicious prosecution issue because, regardless of their statements, probable cause still existed for the purpose of trying Mr. Brooks on the weapon charge and seeking the sentence enhancement. In making this determination, the district court pointed out multiple reports by investigators other than Deputies Gaenzle and Smith supported both the charge and enhancement.[10] Thus,

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[10] These reports included: (1) Detective G. Cliff Porter's report on Mr. Brooks's admission to carrying a 9mm pistol on the day of the burglary, even though he later recanted his admission; (2) Detective Ralph Losasso's report on his interview with Amanda Hall during which she stated she saw Mr. Brooks sitting in the back of a car with a rifle in his hands on the day of the burglary and that he later told her he shot at police as he and Mr. Acevedo attempted to flee the scene; (3) Detective Rick Frady's report corroborating Detective Losasso's report about Ms. Hall's interview; (4) Detective Michael Simler's report on his interview of Daniel Mileto, who acted as an accomplice to the

(Continued on following page)

the district court concluded that if the deputies' alleged false statements were removed from the analysis, sufficient additional evidence existed for probable cause to charge Mr. Brooks with possession of a gun by a felon and seek a sentence enhancement.

On appeal, Mr. Brooks renews his arguments in support of his malicious prosecution claim, stating the deputies' false statements tainted the entire investigative and probable cause process. The deputies argue in support of the district court's grant of summary judgment and point out Mr. Brooks's public defender conceded in his deposition that sufficient information existed to establish probable cause of weapon possession, even absent the deputies' statements.[11]

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burglary after the fact, during which he stated Mr. Brooks admitted to firing on police during the burglary; (5) other district attorney investigative reports containing numerous statements by these and other witnesses that Mr. Brooks admitted to shooting at the officers during the burglary; and (6) an affidavit by the assistant district attorney stating the decision to bring a weapon charge and seek a sentence enhancement was based on multiple sources of information, so the deputies' statements as to Mr. Brooks's possession of a weapon were immaterial to that decision.

[11] Deputies Gaenzle and Smith alternatively point out that while this circuit has addressed malicious prosecution as a constitutional tort, the Supreme Court has not expressly recognized such a constitutional tort, and therefore, it seeks to preserve such an issue for future appeal. However, we need not address their alternative malicious prosecution argument given our affirmation of the district court's grant of summary judgment in favor of Deputies Gaenzle and Smith.

As the district court held, to support his malicious prosecution claim Mr. Brooks must show that, absent the deputies' alleged misrepresented statements, the government lacked probable cause to charge him with weapon possession or to seek a weapon sentence enhancement. *See Grubbs v. Bailes*, 445 F.3d 1275, 1278 (10th Cir.2006) (holding "[i]f hypothetically correcting the misrepresentation or omission would not alter the determination of probable cause, the misconduct was not of constitutional significance and is not actionable under § 1983"). In this case, even if the deputies had not reported Mr. Brooks's possession of a gun, it is clear an investigation would have been conducted concerning whether either suspect possessed a gun for the purpose of ascertaining and/or confirming who shot at the deputies through the door. Considering the various investigative reports and affidavits relied on by the district court, we agree in this case sufficient additional evidence supported charging Mr. Brooks with possession of a weapon by a felon and seeking a weapon sentence enhancement against him, regardless of whether Deputies Gaenzle and Smith made false statements on his possession of a weapon. In other words, even absent the deputies' statements he possessed a gun, sufficient other investigative evidence supported bringing such a charge and seeking an enhancement.

2. Conspiracy

As to the conspiracy claim alleged in his second federal action, Mr. Brooks alleged in his amended complaint Deputies Gaenzle and Smith "conspired to make false reports and statements in the official proceedings investigating [Deputy] Gaenzle's shooting of [him] *in violation of 42 U.S.C. § 1985.*" Apt.App. at 10 (emphasis added). However, in responding to their motion for summary judgment, he abandoned his § 1985 conspiracy action, stating "[i]nsofar as [Mr.] Brooks alleges conspiracy under § 1985(2), that claim may be dismissed. Mr. Brooks' *§ 1983 conspiracy claim* is adequately supported by the record to withstand summary judgment." *Id.* at 243. In support, he asserted his expert witness found inconsistencies in the deputies' statements which established a conspiracy and provided the district court the affidavit of that witness, which stated in relevant part:

> The inconsistencies which exist in [Deputies Gaenzle's and Smith's] reports are of a quantity and nature that arouse suspicion concerning the veracity of [their] report that [Mr.] Brooks was armed when shot by Deputy Gaenzle. [Deputies] Gaenzle's and Smith's report of a gun is inconsistent with their conduct and the known undisputed facts of the case.

Id. at 176-77. Other than this, the record on appeal only includes a portion of the deposition transcript of the same expert, who stated inconsistencies and discrepancies existed in the deputies' reports which

raised "flags," but only discussed with any specificity one inconsistency concerning Deputy Gaenzle's first statement they found a black male in the garage, as compared to his subsequent and repeated statements it was a white male. Relying on this and the expert witness's affidavit, Mr. Brooks surmised that "inconsistencies in [Deputies] Gaenzle's and Smith's accounts are 'red flags' that they have conspired to 'whitewash' the truth." *Id.* at 243.

In addressing Mr. Brooks's conspiracy argument, the district court acknowledged an issue existed as to whether he failed to properly plead conspiracy under § 1983 but determined that, regardless of that issue, he failed to raise a triable issue of fact on the necessary elements of his conspiracy claim, including allegations of a shared conspiratorial objective, concerted action, and an actual deprivation of rights. In so holding, it also noted his claim was based on the affidavit of his expert in which the expert merely stated that inconsistencies existed within the deputies' reports. The district court held Mr. Brooks's vague claim on the existence of such inconsistencies did not raise a triable issue of fact they participated in a conspiracy to falsely claim he possessed a gun, including the required elements that they had a "shared objective" or acted in "concert[ ]." *Id.* at 38.

On appeal, Mr. Brooks continues to suggest material inconsistencies exist, including the fact each deputy reacted differently to the threat he allegedly

posed, as demonstrated by Deputy Gaenzle's drawing his gun and shooting, while Deputy Smith did not.[12] He also contends he sufficiently pled conspiracy under § 1983 when the entirety of his complaint and its allegations are read together.

In *Dixon v. City of Lawton*, we explained many differences exist between § 1983 and § 1985 for the purpose of alleging an actionable conspiracy. *See* 898 F.2d 1443, 1447, 1449 & n. 6 (10th Cir.1990). For instance, § 1983 applies to defendants acting under color of state law, while § 1985 applies to "private conspiracies driven by some racial or otherwise class-based discriminatory animus." *Id.* at 1447 (internal quotation marks and citation omitted). However, despite these and other differences in pleading actions under § 1983 and § 1985, we have generally held a federal conspiracy action brought under either of these statutes requires at least a combination of two or more persons acting in concert and an allegation of a meeting of the minds, an agreement among the defendants, or a general conspiratorial objective. *See Salehpoor v. Shahinpoor*, 358 F.3d 782, 785, 789 (10th Cir.2004) (regarding

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[12] Other perceived inconsistencies he points to include: (1) the fact the deputies initially omitted the fact the fleeing suspect was black and the one in the garage was white; (2) their statements they did not know who shot them, even though they knew the white male was blocking the door; and (3) their statements they did not continue to pursue Mr. Brooks because they did not see another party exit the house, even though Deputy Smith later stated he saw a white male flee behind Mr. Brooks.

§ 1985 action); *Abercrombie v. City of Catoosa,* 896 F.2d 1228, 1229, 1231 (10th Cir.1990) (regarding § 1985 action); *Snell v. Tunnell,* 920 F.2d 673, 702 (10th Cir.1990) (regarding § 1983 action). In addition, while we have said allegations of a conspiracy may form the basis of a § 1983 claim, we have also held "a plaintiff must allege specific facts showing an agreement and concerted action amongst the defendants" because "'[c]onclusory allegations of conspiracy are insufficient to state a valid § 1983 claim.'" *Tonkovich v. Kan. Bd. of Regents,* 159 F.3d 504, 533 (10th Cir.1998) (quoting *Hunt v. Bennett,* 17 F.3d 1263, 1266 (10th Cir.1994)).

In this case, regardless of whether Mr. Brooks properly alleged a violation under § 1983, rather than § 1985, we agree with the district court that his vague claim in his complaint of an alleged conspiracy does not raise a triable issue of fact the deputies participated in a conspiracy. Moreover, his later assertion his expert found inconsistencies in the deputies' statements as to his possession of a gun, without expressly outlining those inconsistencies or why they are material in establishing a conspiracy, does not cure his failure to raise a triable issue of fact they participated in a conspiracy. In addition, his discussion on appeal of other perceived inconsistencies, including the deputies' different reactions during the heat of the moment in which only one raised and shot his gun, also does not cure his failure to raise a triable issue of fact the deputies participated in a conspiracy by acting in concert or with a general

conspiratorial objective. As we previously stated in another civil rights action, an allegation of "[p]arallel action – or inaction . . . – does not necessarily indicate an agreement to act in concert." *Salehpoor*, 358 F.3d at 789. For these reasons, we affirm the district court's grant of summary judgment on Mr. Brooks's federal action for malicious prosecution and conspiracy.

C. Assault and Battery

In support of his state tort claim for relief against Deputy Gaenzle for assault and battery, Mr. Brooks simply stated Deputy Gaenzle "assaulted and battered" him and he suffered damages. In granting summary judgment to Deputy Gaenzle on Mr. Brooks's assault and battery claim, the district court recounted Colorado Revised Statute § 13-80-119, which states:

> (1) *No person . . . shall have a right to recover damages sustained during the commission of or during immediate flight from an act that is defined by any law of this state or the United States to be a felony,* if the conditions stipulated in this section apply.
>
> (2)(a) The court shall dismiss the action for damages and award attorney fees and costs to the person against whom the action was brought if the person bringing the action . . . has been convicted of the felony or has been adjudicated a delinquent as a result of the commission of the act, *unless the*

> *damage was caused by the willful and deliberate act of another person; except that such exception shall not apply if the person who caused the injuries acted:*
>
> (I) *Under a reasonable belief that physical force was reasonable and appropriate to prevent injury to himself or herself or to others, using a degree of force that he or she reasonably believed necessary for that purpose;* or
>
> (II) *Under a reasonable belief that physical force was reasonable and appropriate to prevent the commission of a felony, using a degree of force that he or she reasonably believed necessary for that purpose;* or
>
> (III) As a peace officer, as such person is described in [§] 16-2.5-101, C.R.S., acting within the scope of the officer's employment and acting pursuant to [§] 18-1-707, C.R.S.

Colo.Rev.Stat. § 13-80-119 (emphasis added).

To the extent Deputy Gaenzle was acting in his employ as a peace officer under subsection (2)(a)(III), Colorado Revised Statute § 18-1-707, as referenced above, states in part:

> (1) Except as provided in subsection (2) of this section, a peace officer is justified in *using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:*

(a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or

(b) To defend himself or a third person *from what he reasonably believes to be the use or imminent use of physical force* while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape;

(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section *only when he reasonably believes that it is necessary;*

(a) To defend himself or a third person *from what he reasonably believes to be the use or imminent use of deadly physical force;* or

(b) To effect an arrest, or to prevent the escape from custody, of a person *whom he reasonably believes:*

(I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or

(II) Is attempting to escape by the use of a deadly weapon;. . . .

Colo.Rev.Stat. § 18-1-707 (emphasis added).

In applying these statutes to the instant action for assault and battery, the district court summarily

concluded Mr. Brooks could not recover damages for any injury he sustained because, as prohibited from recovery under § 13-80-119(1) and 2(a), he committed multiple felonies for which the jury convicted him and, even if the willful and deliberate exception in subsection 2(a) applied, Deputy Gaenzle used a "reasonable degree of force" when he shot him.

On appeal, Mr. Brooks continues to claim Deputy Gaenzle's shooting him constitutes a compensable tort of assault and battery under Colorado Revised Statute § 13-80-119 because the force used on him as a fleeing felon was unreasonable. He also suggests Deputy Gaenzle's affirmative response to a hypothetical question – that his shooting of Mr. Brooks constituted excessive force if he was not armed – creates a factual dispute concerning the *subjective* reasonableness of his shooting sufficient to preclude summary judgment on his assault and battery claim. The deputies argue in support of the district court's grant of summary judgment, stating Deputy Gaenzle acted with *objective* reasonableness in shooting Mr. Brooks.

While the district court granted summary judgment to the deputies on Mr. Brooks's state tort claim, we have ruled pendent jurisdiction over state claims "is exercised on a discretionary basis" and generally held that "[i]f federal claims are dismissed before trial, leaving only issues of state law, 'the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.'" *Bauchman v. West High Sch.*, 132 F.3d 542, 549 (10th Cir.1997) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S.

343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988), and *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)). We generally decline to exercise pendent jurisdiction in such instances because "[n]otions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary." *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir.1995) (internal quotation marks and citation omitted). Similarly, Colorado law recognizes "if a plaintiff asserts all of his or her claims, including state law claims, in federal court, and the federal court declines to exercise supplemental jurisdiction [over the state claims], the plaintiff may refile those claims in state court." *Dalal v. Alliant Techsystems, Inc.*, 934 P.2d 830, 834 (Colo.App.1996) (relying on 28 U.S.C. § 1367(d), which pertains to supplemental jurisdiction and states the period of limitation for a state claim is tolled while claim is pending in federal court and for thirty days after it is dismissed unless state law provides for a longer tolling period).

Having affirmed the district court's dismissal of the federal issues, only the supplemental or pendent state tort issue of assault and battery is left. We believe this issue is best left for a state court's determination, including whether Colorado Revised Statute § 13-80-119 and/or § 18-1-707, as applied specifically to peace officers, require either objective or subjective reasonable force, as disputed by the parties. Accordingly, we decline to exercise jurisdiction over Mr. Brooks's remaining state law claim,

and, instead, reverse the district court's grant of summary judgment on that claim and remand with instructions to dismiss it without prejudice. *See Bauchman,* 132 F.3d at 549-50; *Ball,* 54 F.3d at 669.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the district court's grant of summary judgment to Deputies Gaenzle and Smith on Mr. Brooks's federal actions for excessive force and conspiracy and malicious prosecution. We **REVERSE** the district court's grant of summary judgment to the deputies on the remaining state law claim of assault and battery and **REMAND** that claim to the district court with instructions to dismiss it without prejudice.

2009 WL 3158138 (D.Colo.)

United States District Court,
D. Colorado.
Keith Clayton BROOKS, Jr., Plaintiff,
v.
Steve GAENZLE, Individually and in His Official Capacity as Deputy; Paul Smith, Individually and in His Official Capacity as Deputy; Terry Maketa, Individually and in His Official Capacity as Sheriff; El Paso County Sheriff's Department; and El Paso County, Defendants.
Civil Action No. 06-cv-01436-CMA-MJW.

Sept. 29, 2009.

Paul S. Swedlund, Baker & Hostetler, LLP, Denver, CO, for Plaintiff.

Richard C. Anguiano, Gordon Lamar Vaughan, Vaughan & Demuro, Colorado Springs, CO, for Defendants.

ORDER ADOPTING AND AFFIRMING FEBRUARY 19, 2009 RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

CHRISTINE M. ARGUELLO, District Judge.

This matter is before the Court on the Recommendation by the Magistrate Judge that Defendants' Motion for Summary Judgment be granted (Doc. # 170). Plaintiff objected to the Recommendation. (Doc. # 171.) In light of Plaintiff's objections, the Court has conducted the requisite *de novo* review of the issues, the Recommendation and Plaintiff's objections. Based on

this review, the Court has concluded that the Magistrate Judge's thorough and comprehensive analyses and recommendations are correct. Therefore, the Recommendation is AFFIRMED AND ADOPTED and Defendants' Motion (Doc. # 154) is GRANTED.

FACTUAL BACKGROUND

The Magistrate Judge described the facts of this case in his Recommendation and this Court will adopt and incorporate that description herein. However, a brief recap of the facts will help explain the Court's decision.

On October 17, 2005, Plaintiff and Nick Acevedo broke into a house at 950 Lindstrom Drive, Colorado Springs, Colorado, with the intent to burglarize the home. (Doc. # 157 at 3.) Neighbors called the police, and Defendants Gaenzle and Smith of the El Paso County Sheriff's Department arrived on the scene. (*Id.*) Defendants Gaenzle and Smith heard what sounded like two to three people talking inside the house, so the officers announced their presence and entered the garage. (*Id.*) Defendants Gaenzle and Smith saw somebody in the garage, who quickly stood up, ran into the main portion of the house and blocked the door into the house with his body. (*Id.*) As the officers tried to break down the door, a gunshot from inside the house pierced the door and barely missed the officers' heads and shoulders. (*Id.*) Defendants Gaenzle and Smith could not determine who fired the shot from inside the house.

The officers briefly left the garage to determine if either officer had been injured. (*Id.* at 4.) While standing in the back yard, they observed a suspect flee the house and begin to climb a fence. (*Id.*) At the time, the officers did not know whether the fleeing suspect was the one who had just shot at them in the garage, or whether the fleeing suspect was another person from inside the house. Defendant Gaenzle yelled "stop," but it is unknown whether the fleeing suspect heard him. (*Id.* at 5.) Defendant Gaenzle fired a shot at the fleeing suspect, which turned out to be Plaintiff. Defendant Gaenzle's shot struck Plaintiff in the buttocks or lower back area, but Plaintiff continued his flight and there is no evidence in the record that the shot even slowed Plaintiff's escape. (*Id.* at 4.) Mr. Acevedo joined Plaintiff in running from the house and they both made it over the fence to a car parked nearby. (*Id.* at 5.) Neither officer pursued the suspects over the fence. (*Id.*)

Police apprehended Plaintiff on October 20, 2005, after chasing him from a Colorado Springs mall parking lot to a nearby home. (Doc. # 154, Ex. A-7.) Police shot and killed Mr. Acevedo thirteen days later in a gunfight. (Doc. # 157 at 9.) Mr. Acevedo died holding the gun used to fire through the garage door at 950 Lindstrom Drive. (*Id.*)

Plaintiff alleges that he never used or possessed a weapon during the burglary of 950 Lindstrom. However, Defendants Gaenzle and Smith both reported that they saw a gun in Plaintiff's possession as he fled the house. Moreover, Defendants Gaenzle

and Smith stated that they had no way of knowing whether it was Plaintiff who shot at them through the door, or whether Mr. Acevedo pulled the trigger. Other investigators also concluded that Plaintiff had a weapon during the burglary, but Plaintiff disputes these findings.

The District Attorney charged Plaintiff with: (1) criminal attempt to commit murder in the first degree, after deliberation, of a police officer; (2) criminal attempt to commit murder in the second degree; (3) assault in the first degree; (4) first degree burglary-assault or menace; (5) first degree burglary-deadly weapon; (6) menacing; and (7) possession of a weapon by a felon. (*Id.*) The jury convicted Plaintiff of all charges except number seven, the weapons possession charge. (*Id.* at 5.) The jury also found specifically that Plaintiff did not use or possess a firearm and, thus, was not eligible for a sentence enhancement under C.R.S. § 18-1.3-406. (*Id.*)

PROCEDURAL BACKGROUND

The operative complaint, Plaintiff's Second Amended Complaint (Doc. # 50), alleges four claims for relief against Defendants Gaenzle, Smith, Sheriff Terry Maketa, the El Paso County Sheriff's Department, and El Paso County. Plaintiff alleges (1) a violation of 42 U.S.C. § 1983 based on Defendants Gaenzle and Smith's use of excessive force in "seizing" Plaintiff during the burglary; (2) assault and battery; (3) a violation of 42 U.S.C. § 1983 & 1985 based on

Defendants Gaenzle and Smith's alleged conspiracy to make false reports to justify their use of force and prosecution of Plaintiff; and (4) a violation of 42 U.S.C. § 1983 against Defendants Maketa, the Sheriff's Department, and the County for developing and maintaining unconstitutional policies regarding the use of force. However, the parties stipulated to the dismissal of the claims against Defendant Maketa, the Sheriff's Department, and the County. (Doc.152 and 156.) Thus, only the claims against Defendants Gaenzle and Smith remain.

Defendants Gaenzle and Smith moved for summary judgment on all of Plaintiff's claims. (Doc. # 154.) The parties briefed the Motion and the Magistrate Judge recommended that this Court grant the Motion. (Doc. # 170.) Plaintiff filed twelve timely objections (Doc. # 171) and Defendants filed a response to those objections. (Doc. # 172.)

STANDARDS OF REVIEW

Two standards of review are at issue – the standards for a district court's review of a magistrate judge's recommendation and a motion for summary judgment.

I. DISTRICT COURT REVIEW UNDER RULE 72(b)

Pursuant to Federal Rule 72(b), a magistrate judge may recommend disposition of a dispositive

motion or prisoner petition. Fed.R.Civ.P. 72(b)(1). A party may then file "specific written objections to the proposed findings and recommendations" within ten days of the date of service of the recommendation. Fed.R.Civ.P. 72(b)(2). The district judge must then resolve the objections using a *de novo* standard of review regarding those portions of the recommendation that have "been properly objected to." Fed.R.Civ.P. 72(b)(3); *see also generally In re Griego*, 64 F.3d 580 (10th Cir.1995) (discussing *de novo* review of magistrate judge's recommendations). As to the magistrate judge's recommendations or findings for which a party makes no specific objection, the district court still must satisfy itself that no clear mistake of law or fact has occurred. *See Campbell v. U.S. Dist. Ct.*, 501 F.2d 196, 206 (9th Cir.1974).

When conducting a *de novo* review, the district court makes its own decisions regarding disputed issues. *See Dotson v. Zenon*, 549 F.Supp.2d 1291, 1297 (D.Colo.2008) (citing and quoting *Branch v. Matin*, 886 F.2d 1043, 1046 (8th Cir.1989)). However, the district court need not entirely ignore the magistrate judge's recommendations. 91 C.J.S. *United States Magistrates* § 9. Nor must the district court mechanically spell out each reason for accepting or rejecting a party's objections. *See Garcia v. City of Albuquerque*, 232 F.3d 760, 766-67 (10th Cir.2000).

II. MOTION FOR SUMMARY JUDGMENT

Courts should grant summary judgment if the record indicates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Deepwater Investments, Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110-11 (10th Cir.1991); *Devery Implement Co. v. J.I. Case Co.*, 944 F.2d 724, 726 (10th Cir.1991). The moving party bears the initial burden of demonstrating the lack of an issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the movant meets this burden, the non-movant must respond with evidence sufficient to create a genuine issue of material fact for trial. *Id.* at 324; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). To overcome a motion for summary judgment, the non-moving party must present enough evidence to allow a reasonable jury to find in its favor. *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir.1993). In analyzing the evidence on a motion for summary judgment, a court should view the factual record and draw reasonable inferences in favor of the non-moving party. *Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848, 851 (10th Cir.1995).

ANALYSIS

Plaintiff presented four claims for relief. In his first claim, Plaintiff contends that Defendants

Gaenzle and Smith violated his Fourth and Fourteenth Amendment rights by using excessive force in attempting to seize Plaintiff as he fled 950 Lindstrom. *See* U.S. Const. amend. IV; *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

I. CLAIM ONE – FOURTH AMENDMENT

To prevail on his Fourth Amendment claim, Plaintiff must show: (1) that a seizure occurred and (2) that force used in making the seizure was unreasonable. *See Brower v. County of Inyo,* 489 U.S. 593, 599, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989); *Bella v. Chamberlain,* 24 F.3d 1251, 1255 (10th Cir.1994).

A. *Fourth Amendment Applicable Law*

1. *Seizure*

There is no bright line test for determining when a seizure occurs under the Fourth Amendment. Regardless of the exact test applied, a seizure can only occur if the government's actions somehow restrain the movement of the suspect. *See, e.g., Brower,* 489 U.S. at 595-96 (focusing on the "termination of [the suspect's] movement"); *Garner,* 471 U.S. at 7 ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person."); *Bella,* 24 F.3d at 1255 (the Supreme Court "expressly stated that an assertion of authority by the police without submission by the fleeing person does not constitute a seizure"). For a seizure to occur, the

government does not have to literally stop the suspect in his tracks or freeze him in place. But, the plain meaning of the word seizure and various Supreme Court interpretations indicate that the government must do something that gives it the opportunity to control the suspect's ability to evade capture or control. *See Brower*, 489 U.S. at 595-96 ("Violation of the Fourth Amendment requires an intentional acquisition of physical control."); Merriam-Webster's Online Dictionary (to seize means: "to take possession of . . . to take hold of") (last accessed on September 24, 2009). In other words, the government must have substantially precluded the suspect's ability to loose himself from the government's control.

Thus, an attempt to subdue a suspect by, for example, shooting at and striking his vehicle, but failing to seriously encumber the suspect's ability to flee or evade restraint, does not amount to a seizure for purposes of the Fourth Amendment. *Bella*, 24 F.3d at 1256 (shots that hit fleeing helicopter but did not cause suspect to "submit" to government agents or "otherwise succeed in stopping him" did not constitute a seizure); *see also California v. Hodari*, 499 U.S. 621, 628-29, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (no seizure during course of foot chase because government "'show of authority' did not produce his stop"). Even the supplemental authority cited by Plaintiff, *Lemery v. Beckner*, 323 Fed. Appx. 644 (April 14, 2009 10th Cir..), requires a suspect to establish that the government caused a termination of his movement before the Fourth Amendment is

implicated. *Id.* at *5 (noting that plaintiff in that case was "momentarily stopped before running away").

* * *

B. *No Seizure Occurred In This Case*

The Magistrate Judge recommends that this Court enter summary judgment on Plaintiff's first claim because the Magistrate Judge concluded that no Fourth Amendment seizure had occurred. (Doc. # 170 at 7-8.) Plaintiff objects to this recommendation. He argues that a seizure occurs when the government applies any physical force to a suspect, regardless of whether the suspect escapes. Plaintiff is incorrect.

In this case, Defendant Gaenzle shot and struck Plaintiff, but Plaintiff managed to climb the fence and elude arrest for three days. Indeed, none of the evidence in the record reflects that Defendant Gaenzle's shot even temporarily halted Plaintiff in his escape from 950 Lindstrom. In short, Defendant Gaenzle's gunshot amounted to nothing more than an attempted seizure, which does implicate the Fourth Amendment.

The cases cited by Plaintiff do not change this result and in fact support it. For example, Plaintiff cites *Lemery* and argues that the Fourth Amendment is implicated anytime a police officer shoots a suspect. However, the key fact in *Lemery* was not the shooting, but the temporary restriction on the suspect's movement caused by the shot. In contrast, no temporary

restriction of Plaintiff's movement occurred in this case.

Plaintiff also cites dicta in *Bella* as support for the proposition that shooting a fleeing suspect automatically constitutes a Fourth Amendment seizure. However, this dicta is tempered by the context of the statement in that case, which indicates that shooting a suspect is only a seizure if it causes the suspect to "submit to this show of authority." *Bella*, 24 F.3d at 1255. Footnote six in *Bella* also undercuts the persuasiveness of Plaintiff's argument. That footnote states: "We note, however, that it may not be a foregone conclusion that a Fourth Amendment 'seizure' would have occurred even had the officer's shot accidentally hit Mr. Bella." 24 F.3d at 1256 n. 6.

The facts of this case are also distinguishable from the facts in *Garner*, *Brower*, and *Cole v. Bone*, 993 F.2d 1328 (8th Cir.1993). In *Garner*, the police officers shot and killed an unarmed, fleeing suspect. Because the shot immediately subdued the suspect, the issue of whether the government had seized the fleeing suspect was not in dispute. 471 U.S. at 3. In *Brower*, the police stopped a fleeing suspect by causing the suspect's car to collide with a roadblock that police had placed behind a blind curve in the middle of the night. The collision killed the suspect. A similar scenario occurred in *Cole*, wherein police stopped a fleeing suspect, who was behind the wheel of a tractor-trailer rig, by shooting and killing the suspect. Each of these decisions held that a Fourth

Amendment seizure had occurred only upon termination of the fleeing suspects' movement.

The *Cole* court made especially clear that previous attempts by police to use physical force to stop the suspect (*e.g.*, rolling roadblocks and shooting out the tires) did not produce a Fourth Amendment seizure. Only after police had restricted the suspect's movement did the court conclude that a seizure had occurred. 993 F.2d at 1332.

The holdings in these cases would likely have been different if the fleeing suspects had, as was the situation in this case, survived their respective encounters with the police and eluded arrest by escaping from the scene. *See, e.g., Bella,* 24 F.3d at 1255-56. Conversely, the outcome in this case would likely be different if Defendant Gaenzle's shot hobbled or injured Plaintiff, thereby preventing him from climbing over the fence and escaping with Mr. Acevedo. But, it appears that the gunshot, although it presumably Plaintiff [sic] pain or slowed the pace of his escape did not bring Plaintiff within the government's possession or control. *See Cole,* 993 F.2d at 1332 ("The pursuit in and of itself did not constitute a seizure, because it did not produce a stop.") Indeed, Plaintiff still had enough spring in his step to evade police in the mall parking lot days later.

Defendant Gaenzle's gunshot may have injured Plaintiff, but it clearly did not "produce his stop" or

"terminate [his] movement." Therefore, the Magistrate Judge correctly found that there was no seizure for purposes of the Fourth Amendment.[1]

* * *

CONCLUSION

Upon a *de novo* review of the issues raised by Plaintiff's objections, the Court concludes that the Magistrate Judge correctly analyzed Defendants' Motion for Summary Judgment.

Accordingly, the Recommendation on Defendants' Motion for Summary Judgment (Doc. 170) is AFFIRMED AND ADOPTED; and

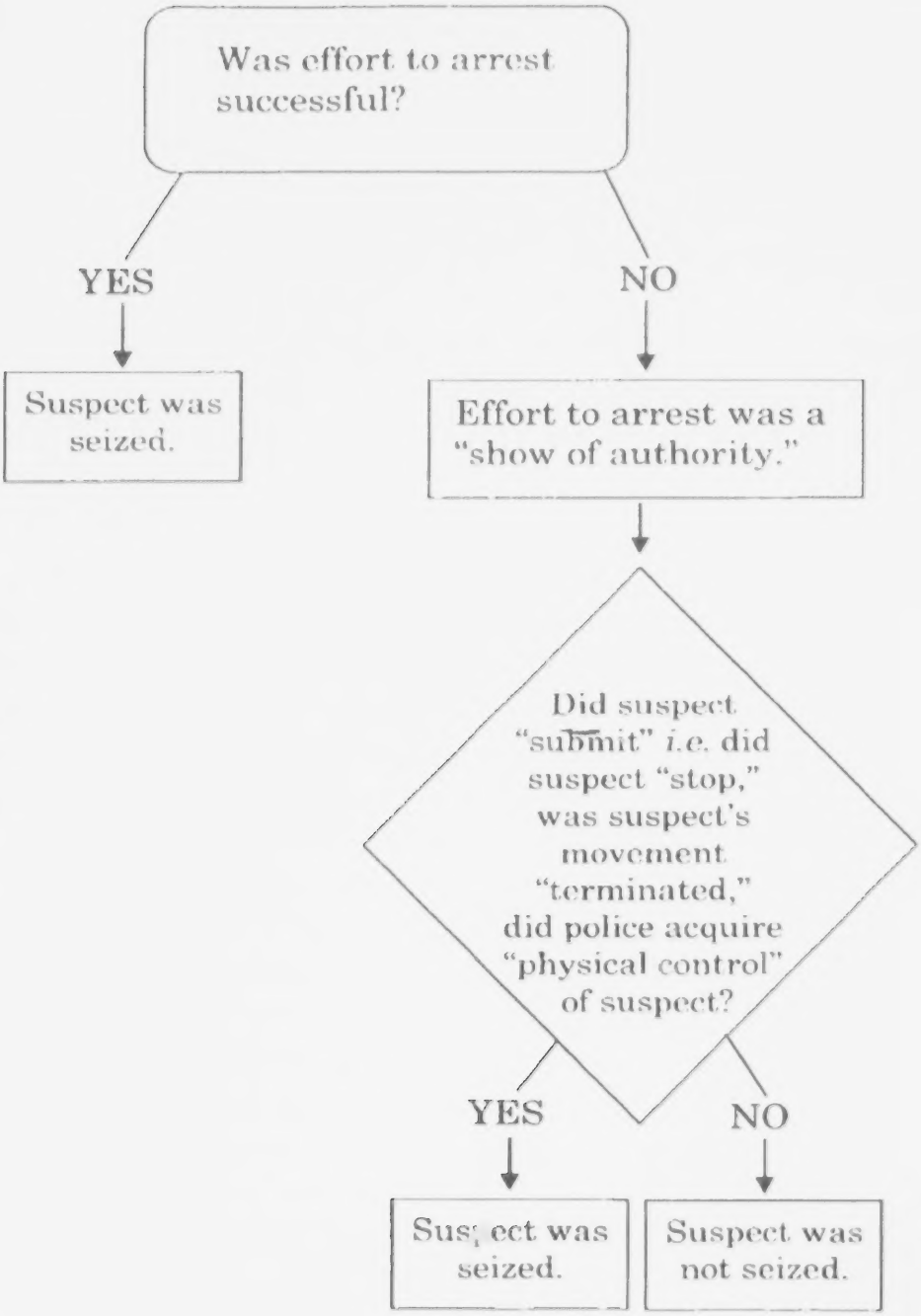
Defendants' Motion for Summary Judgment (Doc. # 154) is GRANTED.

* * *

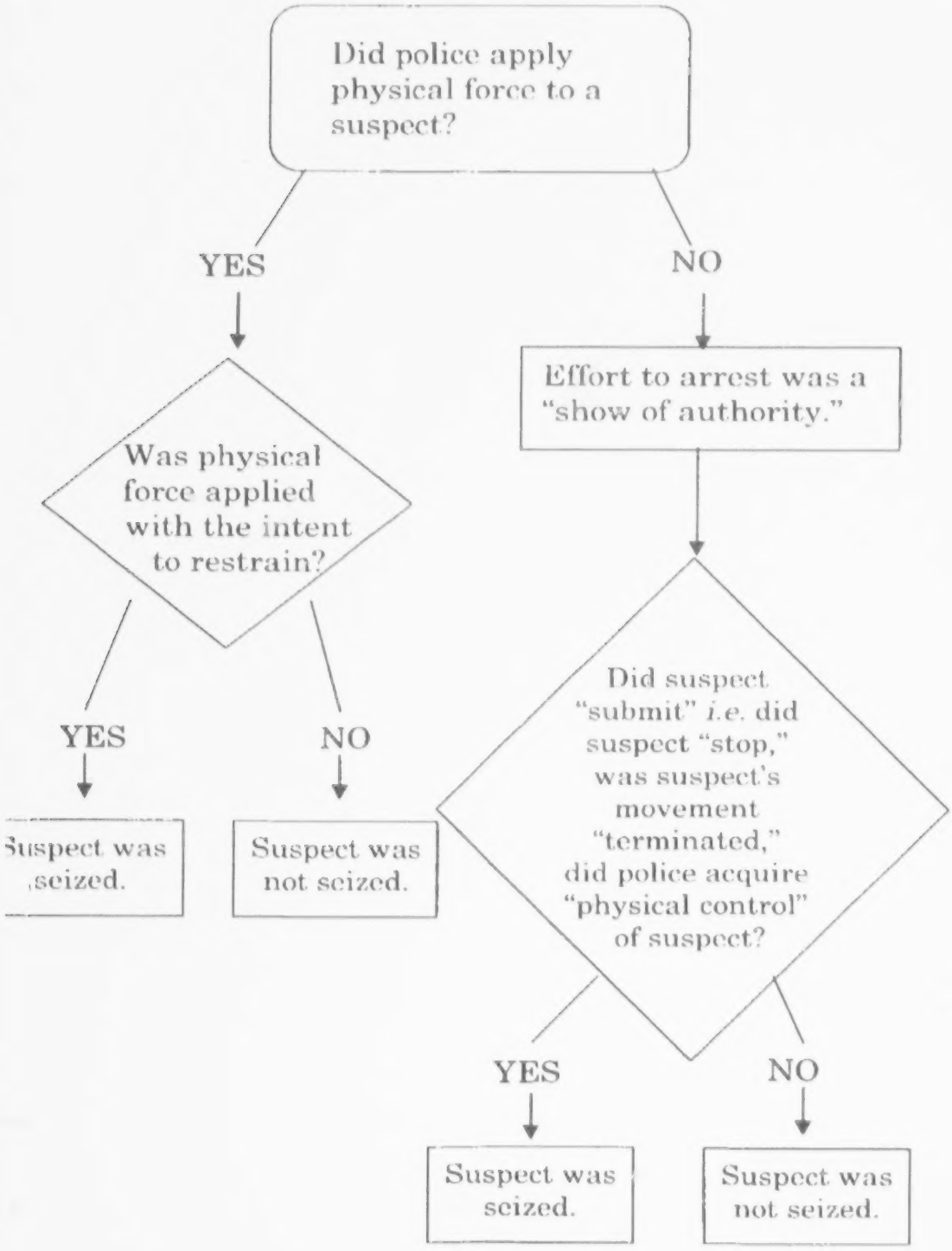
---

[1] This conclusion dooms Plaintiff's first claim. However, because the Magistrate Judge also addressed additional elements of the claim and because Plaintiff has filed objections to the Magistrate Judge's additional conclusions, the Court will likewise address the Magistrate Judge's additional findings and Plaintiff's corresponding objections.

10th Circuit's Erroneous *Brooks* Seizure Analysis



U.S. Supreme Court's Correct *Hodari* Seizure Analysis



Supreme Court, U.S.
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No. 10-621

In The

Supreme Court of the United States

KEITH C. BROOKS,

Petitioner,

v.

STEVE GAENZLE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court reverse the holding in *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989), that for a Fourth Amendment seizure to occur, there must be "governmental termination of freedom of movement through means intentionally applied?" (emphasis deleted).

PARTIES TO THE PROCEEDING

Keith Clayton Brooks was the Plaintiff in the district court action and Petitioner below and is Petitioner in this Court. Steve Gaenzle, Paul Smith, Terry Maketa, the El Paso County Sheriff's Office, and El Paso County, Colorado were Defendants in the district court action. Steve Gaenzle and Paul Smith were Respondents in the Tenth Circuit Court of Appeals. Steve Gaenzle is the only Respondent in this Court.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is published as *Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir. 2010) and is included as Petitioner Appendix ("Pet. App.") pages 1-40. The memorandum opinion of the United States District Court for the District of Colorado is unreported but is available as *Brooks v. Gaenzle*, No. 06-1436, slip. op., 2009 WL 3158138 (D. Colo. Sept. 29, 2009) and is included, in part, as Pet. App. pages 41-53.

STATEMENT OF JURISDICTION

The opinion of the Tenth Circuit Court of Appeals was entered on August 10, 2010. By order entered August 26, 2010, the Court of Appeals extended the time for filing a petition for rehearing until September 13, 2010. By order of September 17, 2010, the Court of Appeals extended the time for filing a petition for rehearing until September 20, 2010. Petitioner did not file a petition for rehearing but instead filed his petition for writ of certiorari on November 8, 2010, and invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part, "[t]he right of

the people to be secure in their persons . . . against unreasonable searches and seizures . . . ."

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This matter arises out of an October 17, 2005, incident in which Petitioner, Keith Clayton Brooks, Jr. ("Brooks"), was shot in the buttocks while fleeing from the scene of a burglary and attempted murder of two El Paso County, Colorado, Sheriff's Office ("EPSO") deputies. Brooks brought federal claims for relief including excessive force in violation of the Fourth Amendment, conspiracy, and malicious prosecution, and state tort claims of assault and battery against the two EPSO deputies, Steve Gaenzle ("Gaenzle") and Paul Smith ("Smith"), in both their individual and official capacities as well as claims against Terry Maketa, Sheriff of El Paso County, Colorado, the El Paso County Sheriff's Department, and El Paso County, Colorado.

By stipulation, the El Paso County Sheriff's Department, El Paso County Sheriff Terry Maketa, and the El Paso County Board of County Commissioners were dismissed.

On April 30, 2008, following extensive discovery, Gaenzle and Smith filed their motion for summary judgment. On February 19, 2009, Magistrate Judge Michael J. Watanabe, pursuant to an order of reference by the district court, submitted his recommendation on the deputies' motion for summary

judgment. *See Brooks v. Gaenzle*, No. 06-1436, slip. op., 2009 WL 3158138, at *13-26 (D. Colo. Sept. 29, 2009) (recommendation attached to the decision of the district court). Therein, Magistrate Judge Watanabe recommended that the motion be granted as to each of Brooks' claims for relief.

Following Brooks' objection to Magistrate Judge Watanabe's recommendation, and after additional briefing, District Court Judge Christine Arguello, on September 29, 2009, issued her decision adopting the recommendation and affirming summary judgment. *See id.*

Brooks appealed the order of summary judgment of Judge Arguello to the United States Court of Appeals for the Tenth Circuit. On August 10, 2010, Circuit Judges Wade Brorby, Terrence O'Brien, and Neil Gorsuch affirmed the district court's grant of summary judgment as to Brooks' federal actions for excessive force, conspiracy, and malicious prosecution, though reversed the district court's grant of summary judgment on the state law claims of assault and battery, remanding those claims to the district court with instructions to dismiss them without prejudice based on the absence of pendent jurisdiction.

Brooks seeks certiorari as to only the federal action for Fourth Amendment excessive force against Deputy Gaenzle.

II. FACTS RELEVANT TO THE PETITION

The Tenth Circuit, in its description of the factual background of the case, relied upon "the parties' statement of undisputed facts, as amended by Brooks, in his response to the Deputies' motion for summary judgment." *Brooks v. Gaenzle*, 614 F.3d 1213, 1215 n.3 (10th Cir. 2010). The facts material to the Circuit's affirmation of summary judgment are adequately set out in the Circuit's opinion under Section 1, Factual Background. *Id.* at 1215-16. While, in most respects, Brooks' petition adequately tracks the undisputed facts, there are a few important exceptions and omissions. Respondent therefore restates the facts herein.

On October 17, 2005, during daylight hours, Brooks and his accomplice, Nicholas Acevedo ("Acevedo"), forcibly entered a residence located at 950 Lindstrom Drive, El Paso County, Colorado, through a door to a garage located on the east side of the residence with the intent to burglarize the home. Brooks and Acevedo's entry into the garage was witnessed by a neighbor who advised the authorities. *Brooks*, 614 F.3d at 1215; Pet. App. 3.

Deputies Gaenzle and Smith were dispatched to the scene of the burglary. Upon approaching the door to the garage, Gaenzle believed he could hear two or three people talking. Gaenzle and Smith entered the garage, announcing, "Sheriff's Office." *Id.*

Upon entering the garage, Gaenzle and Smith observed a kneeling, male suspect stand up, turn, run

into the main part of the house, and close a door that separated the garage from the main part of the house. While the door was being barricaded by an unknown suspect's body within the house, Gaenzle attempted to enter the door, announcing at the same time, "Sheriff's Office." *Id.*

While attempting to open the door, a gunshot pierced through the door very close to the deputies' heads. Shrapnel from the door struck both Gaenzle and Smith. Neither Gaenzle nor Smith saw who fired the shot through the door, what caliber gun was used, or if there were any other weapons. *Id.*

Within moments of being shot at through the door, Gaenzle and Smith exited the side garage door, checked to see whether they had received any injuries from the gunshot, and then immediately observed a male, later determined to be Brooks, fleeing toward an approximately six foot tall wooden backyard fence. *Brooks*, 2009 WL 3158138 at *14. Brooks was attempting to flee from the scene of the burglary and the attempted murder of the deputies. Gaenzle and Smith both state that Gaenzle ordered the male to stop. An independent witness heard the deputies advise Brooks to stop, but Brooks did not stop. *Brooks*, 614 F.3d at 1215; Pet. App. 4.

Gaenzle fired one shot at the fleeing Brooks, striking Brooks in the buttocks. Despite being shot, Brooks jumped over the six foot fence and continued to flee and escaped the scene with Acevedo. *Id.* No evidence was presented in response to the Motion for Summary

Judgment that indicated that the shot stopped or substantially encumbered or slowed Brooks' escape. *See Brooks*, 2009 WL 3158138 at *1; Pet. App. 43; *Brooks*, 614 F.3d at 1224; Pet. App. 24. Gaenzle and Smith did not pursue Brooks as they had not observed any other party exit the house and intended to remain to secure the perimeter of the house.

Three days later, on October 20, 2005, Brooks was located in the vicinity of the Citadel Mall, a major shopping mall in Colorado Springs, by Colorado Springs Police Department officers and EPSO deputies and was subsequently arrested in a nearby residential garage after Brooks fled from outside the Citadel Mall. *Brooks*, 614 F.3d at 1215; Pet. App. 4. A rifle was part of the evidence collected from the vehicle that Brooks used in his attempt to flee his capture outside the Citadel Mall.

Substantial evidence, independent of the statements of Gaenzle and Smith, was developed in the investigation of Brooks that Brooks did posses a weapon at the time of the burglary and/or that he shot at the deputies at the time of the burglary. *Brooks*, 614 F.3d at 1225 n.10; Pet. App. 28-29.

Brooks went to trial on the following charges: (1) criminal attempt to commit murder in the first degree, after deliberation, of a police officer; (2) criminal attempt to commit murder in the second degree; (3) assault in the first degree; (4) first degree

burglary – assault or menace; (5) first degree burglary – deadly weapon; and (6) menacing. Additionally, as to most of these charges, Brooks was charged with a sentencing enhancement under C.R.S. § 18-1.3-406 on the basis that Brooks used or possessed a deadly weapon during the commission of the charged crimes. *Brooks*, 614 F.3d at 1216; Pet. App. 5.

Brooks was subsequently convicted of all of the above-referenced charges. The jury did not find in favor of the sentencing enhancement under C.R.S. § 18-1.3-406. On the basis of these and prior convictions, Brooks was sentenced as a habitual criminal under C.R.S. § 18-1.3-801 to 148 years in prison. *Id.*

III. THE DISTRICT COURT AND TENTH CIRCUIT OPINIONS

The district court granted summary judgment on behalf of Gaenzle and Smith on the Fourth Amendment excessive force claim on three alternative grounds: (1) that Brooks was not seized by the deputies within the meaning of the Fourth Amendment; (2) that the force used by the deputies was objectively reasonable under the circumstances; and (3) that the deputies were entitled to qualified immunity as their conduct did not violate a clearly-established Constitutional right of Brooks.

As to the seizure issue, the district court noted that there was "no bright line test for determining whether a seizure occurs under the Fourth Amendment" but, citing *Brower v. County of Inyo*, 489 U.S.

593, 595-96 (1989), stated that "a seizure can only occur if the government's actions somehow restrain the movement of the suspect." *Brooks*, 2009 WL 3158138 at *3. The district court observed that while the gunshot which struck Brooks "presumably [caused] Plaintiff pain or slowed the pace of his escape [it] did not bring Plaintiff within the government's possession or control. [cite omitted] Indeed, Plaintiff still had enough spring in his step to evade police in the mall parking lot days later." *Id.* at *6.

Brooks did not, to the district court, argue that pain or slowed movement was sufficient to constitute a seizure.

In affirming the district court's determination that a seizure had not occurred, the Tenth Circuit observed that Brooks' seizure argument "relie[d] on the same or similar arguments he made in opposing the deputies' motion for summary judgment" – that:

> . . . intentional physical deadly force to restrain a suspect's movement is sufficient per se to constitute a seizure, regardless of whether his movement was "substantially precluded" or "seriously encumbered." In making this argument, Mr. Brooks asserts *Hodari* stands for the proposition the "'application of physical force to restrain movement, even when it is ultimately unsuccessful,' is a seizure." He contends such seizure was accomplished when he was struck by the bullet. He concludes that because Deputy Gaenzle applied physical deadly

> force with the intent of restraining his movement, a seizure occurred, regardless of whether his "attempted apprehension was 'ultimately unsuccessful'" or he still had "spring in his step" days later at the time of his arrest. He alternatively contends his "'pain[ed] or slowed' movement," as referenced by the district court, sufficiently constitutes a seizure, as it restrained his movement.

Brooks, 614 F.3d at 1218 (internal citations omitted).

The Tenth Circuit considered, in part, in its seizure analysis the cases of *Terry v. Ohio*,[1] *United States v. Mendenhall*,[2] and *Tennessee v. Garner*,[3] and concluded that:

> Thus, from *Terry*, *Mendenhall*, and *Garner*, one can reasonably conclude a "seizure" requires restraint of one's freedom of movement and includes apprehension or capture by deadly force. However, they do not stand for the proposition, as Mr. Brooks contends, that use of deadly force alone constitutes a seizure. Instead, it is clear restraint of freedom of movement must occur.

Id. at 1219.

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[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

[2] *United States v. Mendenhall*, 446 U.S. 544 (1980).

[3] *Tennessee v. Garner*, 471 U.S. 1 (1985).

The Circuit went on to consider subsequent cases, including *Brower*, noting that "a seizure occurs if the person is 'stopped by the very instrumentality set in motion or put in place' to achieve that result." *Id.* at 1220 (quoting *Brower*, 489 U.S. at 599). The Circuit further noted that *Brower* held that a "'[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control.'" *Brooks*, 614 F.3d at 1220 (quoting *Brower*, 489 U.S. at 596). Applying these seizure principles to *Brooks*, the Circuit noted that:

> . . . the gunfire which struck Mr. Brooks was intentional and intended to stop him, but he was not "stopped by the very instrumentality set in motion" for that purpose and, instead, he continued to flee and elude authorities for days. Under the circumstances, we cannot say authorities gained "intentional acquisition of physical control" over Mr. Brooks.

Brooks, 614 F.3d at 1220 (quoting *Brower*, 489 U.S. at 596).

The Tenth Circuit rejected Brooks' argument that *California v. Hodari D.*, 499 U.S. 621 (1991), modified the seizure analysis of *Brower*, noting that Brooks improperly relied on common law *dicta* in *Hodari*. As to that analysis, the Circuit wrote:

> [I]n relying on the *Hodari* common law dicta, Mr. Brooks and these cases ignore the Hodari Court's further explanation:

> We have consulted the common-law to explain the meaning of seizure. . . . [and] neither usage nor common-law tradition makes an *attempted* seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions.

Brooks, 614 F.3d at 1221 (quoting *Hodari*, 499 U.S. at 626 n.2) (emphasis in original).

The Circuit reasoned that the discussion in *Hodari* of the common-law rule was merely an illustration of the principle that "'attempted seizures'" are beyond the Fourth Amendment scope. The Circuit further noted that "when read in context in its entirety, *Hodari* clarifies that a seizure cannot occur unless a show of authority results in the suspect's submission." *Brooks*, 614 F.3d at 1221.

The Circuit declined to address Brooks' argument that pained or slowed movement was sufficient to constitute a seizure, as such argument was made for the first time on appeal and not raised before the district court and was otherwise not supported by citation or legal authority. *Id.* at 1225. As the Circuit affirmed the excessive force claim on the basis of its seizure analysis, it did not reach the district court's alternative bases for dismissal of objective reasonableness of the force used and qualified immunity.

ARGUMENT

CERTIORARI IS NOT WARRANTED AS *BROWER v. COUNTY OF INYO* SUFFICIENTLY SETS OUT THE PROPER FOURTH AMENDMENT SEIZURE STANDARD.

I. THE TENTH CIRCUIT'S OPINION IS CONSISTENT WITH SUPREME COURT PRECEDENT.

The Fourth Amendment provides protection against "unreasonable searches and seizures."[4] To state a claim for excessive force under the Fourth Amendment, a plaintiff must demonstrate: (1) that a "seizure" occurred and (2) that the force used in affecting the seizure was objectively unreasonable. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989).

This Court has held that for a Fourth Amendment seizure to occur, there must be "governmental termination of freedom of movement through means intentionally applied." *Brower*, 489 U.S. at 597 (emphasis deleted); *see also Scott v. Harris*, 550 U.S. 372, 381 (2007) (citing the same language with approval).

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[4] Respondent agrees that seizure analysis under the Fourth Amendment is an important Constitutional issue but disagrees with Petitioner that the seizure analysis applied by the Tenth Circuit, here, has important Constitutional implications. As set out herein, the Tenth Circuit properly applied the long-standing seizure analysis articulated in *Brower*, and, additionally, the unique facts presented in this case make it unlikely that this Court's consideration of the seizure issue would assist lower courts in performing future Fourth Amendment seizure analysis.

The district court and the Circuit agreed that no seizure had occurred here as:

> . . . Defendant Gaenzle shot and struck Plaintiff, but Plaintiff managed to climb the fence and elude arrest for three days. Indeed, none of the evidence in the record reflects that Defendant Gaenzle's shot even temporarily halted Plaintiff in his escape. . . .

Brooks, 2009 WL 3158138 at * 5; *see also Brooks*, 614 F.3d at 1220.

Brooks argues that *Hodari* modified *Brower* to provide that intent to restrain accompanied by physical force, even if such force fails even momentarily to terminate freedom, is all that is necessary to constitute a Fourth Amendment seizure. Brooks then asserts that certiorari should be granted as the Circuit improperly considered the physical force seizure discussion in *Hodari* as *dicta* and therefore failed to apply it properly to the facts here. (Petition at 26-30). Even cursory review of *Brower* and *Hodari* demonstrates that the Circuit's decision withstands this criticism.

Brower directly considered the issue of seizure by physical force. There, this Court considered whether a plaintiff who crashed into a police roadblock was seized in violation of the Fourth Amendment. Focusing on the actual acquisition of physical control as a condition of seizure, this Court wrote that: "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." *Brower*, 489 U.S. at

596. Expanding on this need for acquisition of physical control, this Court went on to explain that a Fourth Amendment seizure occurred "only when there is a governmental termination of freedom of movement through means intentionally applied." *Id.* at 597 (emphasis deleted).

This Court further observed:

> In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized *who has been stopped* by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. *We think it [is] enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.* It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock – *and that he was so stopped.*

Id. at 598-99 (emphasis added).

As noted in *Brower*, then, a seizure requires an actual termination of freedom. Indeed, there would appear to be little doubt that had the police in *Brower* attempted to terminate the chase with an

unsuccessful Precision Intervention Technique ("PIT") maneuver[5] or had Brower successfully run the roadblock and escaped for days, even if he sustained an injury in the process, a seizure would not have been found to have occurred. *See id.* at 597 ("If . . . the police cruiser had pulled alongside the fleeing car and sideswiped it, *producing the crash*, then the termination of the suspect's freedom of movement would have been a seizure.") (emphasis added).

In *Hodari*, this Court held that a police officer's unheeded orders to a fleeing suspect to halt were not a seizure until the suspect was tackled by the officer and, as such, drugs abandoned during the flight would not be suppressed on an argument of improper seizure. *Hodari*, 499 U.S. at 629. The *Hodari* finding, that a seizure did not occur upon ordering the suspect to halt, looked to early cases determining when, at common law, an arrest had occurred. The issue of whether there was a seizure was important to the issue in *Hodari* of whether evidence that was discarded by the plaintiff after the order to halt but before being physically controlled was a fruit of an unconstitutional seizure or was abandoned.[6] The common law that defined an arrest, cited by this

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[5] The PIT maneuver calls for a pursuing vehicle to make a controlled collision with the fleeing vehicle with the intent to cause the fleeing vehicle to spin and stop. *See Scott v. Harris*, 550 U.S. 372, 375 (2007).

[6] It was conceded in *Hodari* that the officer did not have the reasonable suspicion required to justify stopping Hodari.

Court and relied on now by Brooks, provided that an arrest occurred at the time that an officer laid a hand on the suspect even though laying of such hand may not have succeeded in stopping and holding the suspect.

The facts of *Hodari* did not involve an officer's touching the suspect in any way. Indeed, the *Hodari* Court's physical force seizure reference appears to have been done merely as a contrast to the question of whether *Hodari* was seized by mere show of authority. Thus, to the extent *Hodari* observed that a mere touching constituted an arrest, such holding was, as noted by the Circuit, an isolated comment and non-binding *dicta* as it was unnecessary to the result.[7] Brooks' attempt to argue that the Circuit improperly characterized the physical force seizure observation in *Hodari* as *dicta* is inconsistent with its obvious context of use and against the weight of other authority that has considered it. *See United States v. Dupree*, 617 F.3d 724, 730 n.5 (3rd Cir. 2010) (pointing out that the *Hodari* decision on this point was *dicta*); *Thomas v. Durastanti*, 607 F.3d 655, 663 (10th Cir. 2010) (same). It is also inconsistent with *Hodari*'s limitation of the scope of the opinion. *Hodari*, 499 U.S. at 626 ("The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield.").

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[7] *See Central Green Co. v. United States*, 531 U.S. 425, 431 (2001) (*dicta* may be followed if sufficiently persuasive but is not binding).

This Court has not subsequently decided a case applying the *Hodari* physical force seizure *dicta* to a seizure by mere use of physical force. Moreover, the *dicta* in *Hodari* does not purport to nor does it overrule the *Brower* holding that a seizure occurs only upon the actual termination of freedom. In contrast, this Court, since the *Hodari* decision, has cited with approval the seizure definition in *Brower*. *See Brendlin v. California*, 551 U.S. 249, 254 (2007); *Scott*, 550 U.S. at 384;[8] *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998).

Instructive on the issue of whether this Court intended in *Hodari* to modify the *Brower* termination of freedom requirement in seizure analysis is *Brendlin v. California*, 554 U.S. 249. There, this Court considered whether a traffic stop constituted a seizure for Fourth Amendment purposes. After citing with approval the *Brower* seizure analysis, this Court wrote:

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[8] This Court in *Scott* emphasized the "termination" of freedom aspect of the *Brower* seizure analysis as follows:

> The only question in *Brower* was whether a police roadblock constituted a seizure under the Fourth Amendment. In deciding that question, the relative culpability of the parties is, of course, irrelevant; a seizure occurs whenever the police are "responsib[le] for the termination of [a person's] movement," [*Harris v. Coweta County*], 433 F.3d [807], at 816 [(11th Cir. 2005) (quoting *Brower*, 489 U.S. at 595)], regardless of the reason for the termination.

Scott, 550 U.S. at 584 n.10 (emphasis added).

> A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. *See California v. Hodari D.*, 499 U.S. 621, 626, n. 2, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) [remaining citations omitted].

Brendlin, 551 U.S. at 254. In citing *Hodari* as authority for the above passage, this Court expressed its opinion that *Hodari* did not modify but left in place the actual submission or "termination of freedom" requirement of *Brower* for Fourth Amendment seizure analysis.

Federal courts are in general agreement that a seizure does not occur where an officer attempts to shoot a fleeing suspect but misses and the suspect continues his escape. *See, e.g.*, *Bella v. Chamberlain*, 24 F.3d 1251, 1255-56 (10th Cir. 1994). Based on Brooks' definition of a seizure, then, in such cases had the bullet so much as grazed the successfully fleeing suspect, a seizure would have occurred, thus changing the outcome of those cases. While such analysis may be appropriate for tort concepts of battery, it is wholly inappropriate and unworkable for purposes of establishing a Fourth Amendment seizure. Indeed, there would appear to be no substantive difference, for purposes of Fourth Amendment seizure analysis, whether a bullet fails to strike its intended target or

strikes the target but inflicts a wound insufficient to bring the fleeing suspect under control.

The Circuit, observing the absurd result of a strict application of Brooks' seizure analysis, noted, as did Respondent in his argument below, that a seizure would not occur if an officer used a hand grenade in an attempt to stop a successfully fleeing suspect but the suspect was not physically touched. However, a seizure would be said to have occurred if the officer threw and hit the suspect with a snowball with the intent of stopping the same successfully fleeing suspect. *Brooks*, 614 F.3d at 1223 n.7. The simpler, more logical test to establish a Fourth Amendment seizure should remain that as set out by this Court in *Brower* – that there has been a termination of the freedom of the suspect.

II. THE CIRCUIT COURTS ARE NOT IN SUBSTANTIAL CONFLICT.

Brooks argues that decisions from the Third, Sixth, Seventh, Eighth, and Eleventh Circuits conflict with the Tenth Circuit's decision in *Brooks*. Review of the cases purported to establish such conflict demonstrates that the circuits are either not in conflict or have not squarely addressed the seizure issue in such a manner as to conclude that an irreconcilable conflict exists.

Unlike here, where Brooks has not demonstrated the termination of his freedom of movement or that he "terminated his flight, even momentarily" (*Brooks*,

614 F.3d at 1225 n.8), almost all of the cases purported by Brooks to establish an inter-circuit conflict involve facts where the freedom of the subject of the argued seizure was, at least for some period of time, terminated. For example, in *United States v. Brown*, 448 F.3d 239 (3rd Cir. 2006), the court considered whether the defendant was seized when, in response to a *Terry* stop and command to put his hands on a police vehicle, the defendant initially complied but shortly thereafter tried to escape after an attempted pat-down. Similarly, in *United States v. Dupree*, 617 F.3d at 739, the prosecution conceded on appeal that a seizure occurred where a law enforcement officer grabbed the defendant's arm while the defendant was riding on a bicycle, stopping the bicycle and holding the defendant for approximately two seconds before he broke free in an escape attempt. *See also Ciminillo v. Streicher*, 434 F.3d 461 (6th Cir. 2006) (plaintiff, shot in the face with a beanbag by police in an attempt to quell a riot, fell to the ground as a result of the shot and remained on the ground under orders of the police until he was later ordered to report to other officers at the end of the street); *Sargent v. City of Toledo Police Dept.*, 150 Fed. Appx. 470 (6th Cir. 2006) (not selected for publication) (suspect ran from officers during an attempt to question him regarding a noise complaint and was shot and killed when he retrieved a gun from under a mattress); *Fisher v. Memphis*, 234 F.3d 312 (6th Cir. 2001) (seizure occurred when a police officer jumped onto the hood of a moving vehicle and shot a passenger); *Acevedo v. Canterbury*, 457 F.3d 721 (7th Cir. 2006) (plaintiff

was knocked to the ground by an officer and momentarily lost consciousness); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993) (vehicle chase in which seizure was not found to have occurred until the vehicle had actually been stopped); *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995) (deceased was struck by a police vehicle and was shortly thereafter shot and killed by police); *Carr v. Tatangelo*, 338 F.3d 1259 (11th Cir. 2003) (plaintiff was shot during a confrontation with police and, though able to run into his house, fell to the floor due to the injury and was shortly thereafter removed from the house by police and emergency medical providers); *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003) (passenger in a fleeing vehicle shot by a sheriff's deputy was immediately paralyzed from the chest down and the chase continued only because the driver continued to evade law enforcement for a short period of time after the shooting); *Mercado v. City of Orlando*, 407 F.3d 1152 (11th Cir. 2005) (in police effort to prevent a suicide attempt, plaintiff was hit in head with a rubber projectile, receiving significant brain injury and was effectively in custody both before and after the deployment of the projectile).

Respondent concedes that the facts in some of these cases are ambiguous or insufficiently detailed on the issue of whether the suspect's freedom of movement was terminated for at least some period of time. In *Fisher*, 234 F.3d 312, there is no reference in the opinion as to whether the vehicle stopped after the police officer jumped on the hood of the vehicle and shot the passenger. In *Ludwig*, 54 F.3d 465, the

Eighth Circuit described a seizure, occurring shortly before the deceased was shot and killed, when he was intentionally struck by a police vehicle. The facts surrounding the effect of the deceased's being hit by the vehicle, or even if he was hit by the vehicle, are unclear. The Eighth Circuit describes that: "[a]fter [the] failed attempt to hit Ludwig, the officers formed a semicircle around Ludwig" where Ludwig then engaged in conversation with the officers before he again fled and was shot and killed. *Ludwig*, 54 F.3d at 468-69. The absence of clear factual references that bear on the seizure issue in these cases is insufficient to establish a substantial conflict amongst the circuits.

Examination of these cases that purport to establish inter-circuit conflict also reveals that none directly considers the seizure issue addressed by the district court and the Tenth Circuit here. So too, examination of the subsequent history of the district court and Tenth Circuit decisions here reveals that, as of the time of filing this brief in opposition, no other court has cited, either favorably or unfavorably, either decision.

CONCLUSION

Brower v. County of Inyo provides an appropriate framework for proper Fourth Amendment seizure analysis. The Tenth Circuit's decision, here, is consistent with *Brower*, and the circuits are not in substantial conflict on its application. Moreover, the

unique facts presented in this case make it unlikely that this Court's consideration of the seizure issue would assist lower courts in performing future seizure analysis.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

KEITH C. BROOKS,

Petitioner,

v.

STEVE GAENZLE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner Keith C. Brooks, through his counsel, Baker Hostetler, LLP, hereby files this reply addressed to points made in respondent's brief in opposition to Brooks' petition for writ of certiorari.

1. The 10th Circuit's *Brooks* Decision Is Dangerous Precedent

The 10th Circuit's *Brooks* decision creates a dangerous exception in the constitutional law of excessive force by recognizing "no substantive difference, for purposes of Fourth Amendment seizure analysis, whether a bullet fails to strike its intended target or strikes the target but inflicts a wound insufficient to bring the fleeing suspect under control." OPPOSITION BRIEF at 18-19. There is, of course, a recognized, substantive constitutional difference between striking and not striking a person with a bullet, the former being a type of seizure this Court deems "unmatched" in its "intrusiveness." *Tennessee v. Garner*, 471 U.S. 1, 10, 105 S.Ct. 1694, 1700 (1985).

Whereas *Garner* and its progeny have discouraged and limited applications of deadly force to narrow, constitutionally-prescribed circumstances, the *Brooks* decision creates a broad, new exception that effectively condones excessive force short of force that precludes escape, and encourages police to dodge liability to persons on whom they have visited excessive force by allowing them to "escape." *Brooks v.*

Gaenzle, 614 F.3d 1213, 1224 (10th Cir. 2010), Appendix at 24; *Brooks v. Gaenzle*, 2009 WL 3158138 (D. Colo.) at *6, Appendix at 52.

Brooks' escape exception allows police to intentionally shoot an unarmed bystander at the scene of a felony shooting, as occurred in *Indehar,* but have no excessive force liability if he flees their assault. Police could shoot a vehicle's passenger, as occurred in *Fisher* and *Vaughan,* yet the passenger would have no excessive force remedy if the driver chooses to flee. Or, police could arbitrarily assault citizens on the street, as occurred in *Dupree,* and incidentally discovered evidence would be admissible if the victim successfully flees the scene but is arrested later. The *Brooks* decision's escape exception is so fraught with constitutional peril that it must be swiftly and soundly overturned.

2. Shooting A Suspect In The Back Is Not A "Show Of Authority"

The brief in opposition fails to defend the 10th Circuit's analysis of a shooting as a "show of authority." A show of authority is an effort to arrest "without the use of physical force." *Brendlin v. California,* 554 U.S. 249, 254 (2007); *California v. Hodari,* 499 U.S. 621, 626, 111 S.Ct. 1547, 1551 (1991) (effort to arrest a show of authority "where [physical force] is absent"). Since Gaenzle applied physical force by shooting Brooks in the back, the show of authority cases, such as *Brendlin,* cited in respondent's brief, and

relied on in the *Brooks* decision, have no application to this case.

3. *Brower* Does Not Have Primacy Over *Hodari*

Overruling *Brower v. County of Inyo,* 489 U.S. 593, 600, 109 S.Ct. 1378, 1383 (1989), was not necessary for *Hodari* to adopt its physical force seizure standard because *Brower's* physical control language was dicta. *Brower,* 489 U.S. at 600, 109 S.Ct. at 1383 (proposition that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control" declared "dicta"). *Hodari* certainly qualified *Brower* by siding with *Brower's* concurring justices' view that physical control, while "characteristic of the typical seizure," is not "an essential element." *Brower,* 489 U.S. at 600, 109 S.Ct. at 1383.

The 10th Circuit's *Brooks* decision erred by affording *Brower* primacy over *Hodari.* Blind adherence to *Brower's* physical control dicta causes respondent to read a passage in *Brower* saying it is "*enough* for a seizure that a person be stopped," and a passage interpreting *Brower* saying "a seizure occurs *whenever*" police effect "termination of movement," to mean that stopping or terminating a suspect's movement is a condition precedent to every seizure. OPPOSITION BRIEF at 14, 17, *citing Brower,* 489 U.S. at 598-99 and *Scott v. Harris,* 550 U.S. 372, 384, 127 S.Ct. 1769, 1778 n. 10 (2007) (emphasis added to both). To say it is "enough" for a seizure to stop someone, or that a

seizure occurs "whenever" one's movement is terminated, merely states *sufficient*, but not *necessary*, conditions to effect a seizure.

If *Hodari* had intended to affirm *Brower's* physical control dicta as a controlling seizure standard, it would have phrased the standard as the application of physical force *that* restrains movement rather than as the "application of physical force *to* restrain movement, even when it is ultimately unsuccessful." *Hodari*, 499 U.S. at 626, 111 S.Ct. at 1550 (emphasis added). By adopting the latter standard rather than the former, *Hodari* rejected the implication of *Brower's* dicta that acquisition of physical control is an essential condition for every seizure. Thus, it was error for the 10th Circuit to afford *Brower's* physical control dicta primacy over *Hodari's* later-enunciated seizure standard.

4. *Hodari's* Seizure Standard Is Not Dicta

The brief in opposition justifies giving *Brower* primacy over *Hodari* by characterizing *Hodari's* seizure standard as dicta, allegedly because it was "an isolated comment" that was "unnecessary to the result." OPPOSITION BRIEF at 16. To the contrary, articulating physical force and show of authority seizure standards was essential to resolving the issue presented in *Hodari*.

According to the *Hodari* Court, "the . . . issue presented [was] whether, at the time he dropped the drugs, Hodari had been 'seized' within the meaning of

the Fourth Amendment." *Hodari*, 499 U.S. at 623, 111 S.Ct. at 1549. This issue required this Court to determine what effect the presence or absence of an application of physical force would have on Hodari's claim that his discarded cocaine should be suppressed as the fruit of an unlawful seizure.

The *Hodari* Court ruled that, because "Hodari was untouched by Officer Pertoso at the time he discarded the cocaine," this absence of physical force rendered the police effort to arrest Hodari a mere "show of authority" prior to the time Hodari discarded the subject evidence. *Hodari*, 499 U.S. at 625, 111 S.Ct. at 1550. But, shortly after discarding the cocaine, Officer Pertoso physically tackled Hodari, which this Court deemed a seizure by physical force.

Because defining show of authority and physical force seizures, and distinguishing between them, was integral to resolving the issue before the Court, *Hodari's* seizure standard is not dismissible dicta. *Connecticut v. Doehr*, 501 U.S. 1, 30, 111 S.Ct. 2105, 2122 (1991) (holdings on issues before the Court not dicta).

5. *Dupree* Does Not Characterize *Hodari's* Seizure Standard As Dicta

Citing Footnote 5 in *United States v. Dupree*, 617 F.3d 724 (3rd Cir. 2010), respondent's brief argues that the 10th Circuit is not alone in pronouncing *Hodari's* seizure standard to be dicta. Respondent is incorrect. *Dupree's* Footnote 5 refers to a discreet passage in *Hodari* that theorizes that a continuing arrest

could have arisen "had [Officer Pertoso] laid his hand upon Hodari to arrest him, but Hodari had broken away and *then* cast away the cocaine." *Dupree*, 617 F.3d at 730, *citing Hodari*, 499 U.S. at 625, 111 S.Ct. at 1550. *Dupree* properly characterizes this discussion of "abstract and hypothetical situations" not before the court as dicta. *Doehr*, 501 U.S. at 30, 111 S.Ct. at 2122. Respondent's arguments notwithstanding, the 10th Circuit's *Brooks* decision, together with its decision in *Thomas v. Durastanti*, 607 F.3d 655, 663 (10th Cir. 2010), remain alone among the circuit courts in disregarding *Hodari's* physical force seizure standard as dicta.

6. Snowballs And Hand Grenades

Respondent argues that the "absurd result of a strict application of Brooks' seizure analysis" would be that "a seizure would not occur if an officer used a hand grenade in an attempt to stop a successfully fleeing suspect but the suspect was not physically touched," but that a seizure would occur "if the officer threw and hit the suspect with a snowball" intending to, but not succeeding in, stopping him. OPPOSITION BRIEF at 19. There is nothing "absurd," or in the 10th Circuit's words "illogical," about this result. *Brooks*, 614 F.3d at 1223, n. 7, Appendix at 22.

Tossing a grenade that explodes without striking the suspect with either shrapnel or the force of its concussion is no different than shooting at and missing a suspect. So long as neither produces the suspect's submission, the grenade or the gunshot

are merely unheeded shows of police authority or attempted seizures. Conversely, throwing a snowball, like firing a bullet, is a projection of physical force. If either strikes its intended target for the purpose of attempting to restrain the target's movement, a seizure occurs.

What *is* absurd is pretending that the seizure standard is concerned with the *type* of physical force applied when the standard clearly is concerned only with *whether* it was applied. *Hodari,* 499 U.S. at 625, 111 S.Ct. at 1550 (a person may be seized "by the slightest application of physical force"). The appropriateness of the selected type of force, *i.e.* whether its destructive potential is disproportionate to the circumstances, is the subject of the objective reasonableness test not at issue in this appeal.

When police start carrying snowballs in their holsters, this Court may have the opportunity to affirmatively determine whether it is "absurd" to suggest that a snowball could effect a seizure. In the meantime, however "absurd" it may seem to some, Brooks' theory that a snowball can effect a seizure if applied by police with the intent to restrain, where an exploding grenade will not if it exerts no physical force on the target, is at least logically consistent with *Hodari.*

7. The 10th Circuit Is In Diametric Conflict With Other Circuits

The brief in opposition argues that the *Brooks* decision's conflict with other circuits is not "substantial."

OPPOSITION BRIEF at 19. On the contrary, the *Brooks* decision stands in diametric conflict with how other circuits have applied *Hodari* to shooting and other physical force cases. First, *Brooks* dismisses *Hodari's* seizure standard as dicta while all other circuits adhere to it. Second, *Brooks* deems arrest material to, indeed dispositive of, the seizure question while other circuits deem arrest "immaterial" to their seizure analysis. PETITION FOR CERTIORARI at 13-18, 31-34. Third, *Brooks* creates an escape exception to excessive force liability not recognized by this Court or any other circuit. The conflicts could not be more stark or substantial. PETITION FOR CERTIORARI at 30-31.

The opposition brief argues that the *Brooks* decision can be reconciled with other circuits because the facts in nearly all of the conflicting circuits' cases reflect that the suspect's freedom "was, at least for some period of time, terminated."[1] OPPOSITION

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[1] Assuming restraint in some way is a necessary predicate to a physical force seizure, the question presented by this appeal fairly comprises, and the record is adequately developed for this Court to determine, whether hobbling a suspect by shooting him in the back is sufficient restraint to effect a seizure notwithstanding his escape, or whether acquisition of "physical control" is inherent in inflicting a gunshot wound on a fleeing suspect. *Blonder-Tongue Laboratories, Inc.*, 402 U.S. 313, 321, 91 S.Ct. 1434, 1438 (1971); *Procunier v. Navarette*, 434 U.S. 555, 559 at n. 6, 98 S.Ct. 855, 858 (1978) (this Court's "power to decide is not limited by the precise terms of the question presented"); *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 1877 (1980); *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401

(Continued on following page)

BRIEF at 20. Noting termination in movement as part of a *factual recitation* does not reconcile the conflicting circuits with *Brooks* if termination of movement played no part *in the reasoning* of the other circuits' decisions. An examination of those decisions reveals it did not. PETITION FOR CERTIORARI at 13-18, 31-34. Some decisions, such as *Vaughan*, openly declare termination of movement "immaterial" to the outcome. Other decisions, such as *Fisher,* demonstrate terminated movement's immateriality simply by not mentioning whether or not the subject vehicle stopped after police shot the passenger. The *Brooks* decision's analytical process, which deems terminated movement a condition precedent to a physical force seizure, cannot be reconciled with other circuits' analytical processes which pay no heed to terminated movement.

Finally, the brief in opposition argues that there is no discernable conflict because decisions outside the 10th Circuit are "insufficiently detailed" or lacking in "clear factual references" that reveal what role terminated movement actually played in their decisions. OPPOSITION BRIEF at 20-22. The reason circuits outside the 10th Circuit do not contain detailed factual references bearing on terminated movement is because, unlike the 10th Circuit, they recognize that terminated movement is immaterial to *Hodari's* physical force seizure standard. Thus, the absence of detailed factual references bearing on

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(1976); *Duignan v. United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 568 (1927).

terminated movement outside the 10th Circuit actually proves the existence of a conflict between the analytical framework utilized by those circuits and the 10th Circuit's errant analysis in *Brooks*.

Within two years the 10th Circuit has issued a trilogy of opinions (*Durastanti, Lemery,* and *Brooks*) denouncing *Hodari's* seizure standard as dicta and making termination of movement an essential element of a physical force seizure. No other circuit treats *Hodari's* seizure standard as dicta; no other circuit deems arrest or impaired movement material to the physical force seizure analysis; no other circuit places applications of physical force short of preventing escape outside the Fourth Amendment's protection. Thus, the conflicts between the 10th Circuit and all other circuits are discernable, substantial, and irreconcilable.

CONCLUSION

This Court cannot permit the 10th Circuit's *Brooks* decision to stand. It is not only in diametric conflict with this Court's seizure precedent, as understood and faithfully implemented in the 3rd, 6th, 7th, 8th, and 11th Circuits, it also creates an escape exception that is fraught with potential for constitutional abuse. Even if no other circuit ever follows the 10th Circuit's example, the *Brooks* decision, along with *Durastanti* and *Lemery,* will remain binding precedent within the 10th Circuit, imperiling the rights, and even the safety, of millions of people living

within the 10th Circuit's boundaries. Petitioner Keith C. Brooks accordingly respectfully requests that this Court issue a writ of certiorari to review, and ultimately overturn, the 10th Circuit's *Brooks* decision.

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